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WILLIAM F. HOBBS, doing business as WILLIAM F. HOBBS & CO., Appellee, vs. MONARCH REFRIGERATING COMPANY, a corporation, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

200 I.A. 1

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Appellee filed a bill against the appellant praying for an accounting. From a decree awarding the appellee $4328.70, appellant prosecutes this appeal.

Appellant first contends that the proof does not sustain the material allegations of the bill; that there is a variance between allegations of the bill on the one hand and the findings of the master and decree of the court on the other, and that this variance violates the elementary rule that the allegations of the bill, the proof, and the decree must correspond, and therefore constitutes reversible error. It is argued that the principal material allegation of the bill was the fraudulent representation made by appellant to the appellee that his poultry was wholly destroyed and that he discovered this after the settlement hereinafter mentioned, and that there is no proof to sustain this allegation, and no such finding in the master's report or in the decree.

Appellant was engaged in the public warehouse and cold storage business, and appellee in the wholesale produce and commission business, dealing principally in poultry. Prior to March 19, 1911, appellee delivered to

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the appellant for storage merchandise consisting chiefly of poultry, of the value of more than $21,000. When the poultry was delivered to appellant it issued its warehouse receipts to appellee, also an insurance certificate wherein the appellant agreed to insure the poultry for the full amount of such insurance certificate, the policy to be payable to appellant as trustee for appellee; and in case of loss by fire, appellant was to act as agent for appellee in the collection of the insurance. On said date appellant had issued to appellee insurance certificates amounting to $18,500. Appellant paid the premiums and debited appellee with the same. Appellee was indebted to appellant on various notes secured by the poultry stored in the warehouse, the notes aggregating $12133, and there was a further indebtedness of $1175.41. On March 19, 1911, a fire started on the 5th floor of the warehouse, which was a 7 story and basement building. At the time there was stored in the warehouse 2,230,410 pounds of butter and 1,033,960 pounds of poultry, belonging to different persons including appellee. All of the poultry and butter was destroyed or damaged by fire and water, and appellant proceeded to adjust the loss with the insurance companies. Appellee was dissatisfied with the proposed adjustment and employed an insurance adjuster; appellant also employed an adjuster. The adjustment was carried on and an agreement reached with the insurance companies by the appellant alone. The insurance collected on appellee's property amounted to $11,231.63. Appellee objected to the amount of the settlement, but was informed by appellant that a settlement had been made, and on August 16, 1911, after deducting the amount due and owing from appellee, appellant paid appellee thebalance amounting

the appellant for storage warehouse containing cargo of poultry, of the value of more than $21,000. When the poultry was delivered to appellant it issued its warehouse receipts to Appellee, also an insurance certificate wherein the appellant agreed to insure the poultry for the full amount of such insurance certificate, the policy to be payable to appellant as trustee for appellee and in case of loss by fire, appellant was to act as agent for appellee in the collection of the insurance. On said date appellant had issued to appellee insurance certificate amounting to $18,000. Appellant paid the premiums and delivered appellee warehouse receipts. Appellee was indebted to appellant on various notes secured by the poultry stored in the warehouse, the notes aggregating $12000, and there was a balance indebtedness of $3400.00. On March 18, 1911, a fire started on the 3rd floor of the warehouse, which was a 7 story and basement building. At the time there was stored in the warehouse 2,000,000 pounds of butter and 1,000,000 pounds of poultry, belonging to different parties including appellee. All of the poultry and butter was destroyed or damaged by fire and water, and appellant proceeded to adjust the loss with the insurance companies. Appellee was dissatisfied with the proposed adjustment and employed an insurance adjuster; appellant also employed an adjuster. The adjustment was carried on and an agreement reached with the insurance companies by the appellant alone. The insurance collected on appellee's property amounted to $13,000.00. Appellee objected to the amount of the settlement, but was informed by appellant that a settlement had been made, and on August 18, 1911, after deducting the amount due and owing from appellee, appellant paid appellee twelve hundred

to $2110.53, and took a receipt which was "in full of all claims and demands against the Monarch Refrigerating Company growing out of the fire of March 19, 1911." After the fire, appellee received from appellant certain of the damaged poultry but was unable to dispose of all of it and returned the balance. Appellant then disposed of all of the salvage, selling 497,861 pounds of damaged poultry for $45,899.26, or an average of 9.2 cents per pound. No record was kept by appellant from which can be ascertained the prices and amount received for appellee's damaged poultry, 91,091 pounds of which was included in the above salvage.

The master found that appellant was liable for appellee's poultry unaccounted for at the average price of 9.2 cents per pound, or $8435.57. This amount added to the insurance collected made a total amount due and owing from appellant to appelee of $19,667.20. Appellee had received $15,418.94, which left a balance of $4248.26, with interest from August 16, 1911, for which amount the decree was entered.

Appellant contends that as appellee was experienced in handling poultry and was represented by an able fire insurance adjuster, the settlement made August 16, 1911, is conclusive and binding. The master found that at the time of the execution of the receipt by appellee, as above mentioned, he knew that all of his property had not been destroyed by fire; that appellant had been selling damaged poultry and had sold some of appellee's ; that appellee did not know the amount of money received by appellant from the insurance companies on appellee's property, and

did not know the prices at which appellant was selling the damaged poultry nor the amount of money it realized from the sale of the same; that appellant never rendered to appellee any statement showing the amount of insurance or the amount of money received from the sale of the damaged poultry. This finding is concurred in by the chancellor and is supported by the evidence.

The allegations of the bill, so far as material to the point under consideration, were that appellant represented that all of appellee's poultry had been destroyed by the fire and this was discovered only after the settlement; that it adjusted the loss with the insurance companies for more than $12,000 and deducted from this sum the amount due appellant and paid appellee the balance; that these representations were false and fraudulent and that appellant sold and disposed of appellee's merchandise for more than $24,000 and retained the proceeds thereof.

The allegation that appellant falsely represented that appellee's property was wholly destroyed and that appellee discovered this was untrue only after the settlement, is not sustained by the evidence; on the contrary, the undisputed evidence is that appellee knew long before the settlement that his poultry had not been totally destroyed. However, we are clearly of the opinion that this variance is not of such a substantial nature as to warrant a reversal of the decree. Appellant does not contend that there was no allegation in the bill to support the finding that appellee did not know the amount of insurance collected by appellant or the amount which appellant received for the salvage. It is conceded that appellant acted as trustee for appellee, and as such must show the utmost good faith in the settlement. "Transactions between a party

and one bearing a fiduciary relation to him are upon his motion prima facie voidable upon grounds of public policy, and the burthen of proof, the fiduciary relation being established, is upon the one receiving the benefit to show an absence of undue influence, by establishing the fact that the party acted upon competent and independent advice of another, or such other facts as will satisfy the court that the dealing was at arm's length, or he must show that the transaction was had in the most perfect good faith on his part and was equitable and just between the parties." Thomas v. Whitney, 186 Ill. 225.

Where a fiduciary relation exists, it is not necessary to establish intentional or actual fraud in order to set aside a contract. Beach v. Milton, 244 Ill. 415.

Appellant appears to have conceived that it had the right to settle with appellee by paying him the value of the salvage as agreed between the insurance companies and appellant, and that appellant could then dispose of the salvage and retain any profit it might be able to make. In the case at bar, the fiduciary relation being admitted it was the duty of the appellant to advise appellee of the amount of insurance it had obtained from the insurance companies, and the amount it was receiving for the salvage. It having failed in this regard, the court properly set aside the settlement of August 16, 1911.

Appellant also contends that the court erred in computing the amount which appellant was decreed to pay in the price per pound allowed for the salvage and the number of pounds thereof. Under the facts in this case,

relation

the burden of establishing the number of pounds of salvage sold by appellant and the prices received therefor was upon the appellant. Thomas v. Whitney, supra; 39 Cyc. 476. Having failed in this regard it cannot now be heard to complain.

Finding no reversible error in the record, the decree of the Superior Court of Cook County is affirmed.

AFFIRMED.

329 - 21313.

ESTHER F. FALKENAU, Appellee, vs. DR. H. J. SMEDLEY, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

200 I.A. 6

MR. JUSTICE O'CONNOR delivered the opinion of the court.

This appeal is prosecuted to reverse a judgment of the Municipal Court of Chicago for $531.02, in favor of appellee (plaintiff) and against the appellant (defendant). The parties will hereinafter be designated plaintiff and defendant as in the court below.

Plaintiff was the owner of a series of notes aggregating $8,300.00, which were secured by a mortgage on certain lands in the State of Michigan. The statement of claim set up a written contract between the parties whereby the defendant, in consideration of the extension of the time of payment of one of the notes, assumed and agreed to pay said note; the interest on all of the notes outstanding and the taxes for the year 1913 on the mortgaged lands. Defendant having defaulted in the payment of the taxes and the interest on the notes remaining unpaid, this suit was brought.

The defendant filed an affidavit of merits, and a statement of set off for $1110.00. The plaintiff then filed an affidavit of merits to the defendant's statement of set off. Afterwards, on motion of the plaintiff, the defendant's affidavit of merits and statement of set off

were stricken from the files, and the defendant was given leave to file an amended affidavit of merits and statement of set-off within 10 days. The defendant afterwards filed an amended affidavit of merits, which was also stricken from the files on motion of the plaintiff. At the same time the court denied the motion of the defendant for leave to file an amended statement of set-off, and judgment by default was entered against the defendant for the amount of plaintiff's claim.

The defendant contends that the court erred in striking his statement of set-off from the files.

It is a sufficient answer to this contention to say that the motion to strike defendant's statement of set-off from the files, and the order of court entered thereon, are not contained in the bill of exceptions. The point is not, therefore, preserved for review. Mann v. Brown, 263 Ill. 394. Furthermore, defendant did not elect to stand by his statement of set-off but asked for and was given leave to file an amended statement of set-off. Any error committed was waived and he cannot now be heard to complain. Second National Bank v. Clancy, 178 Ill. App. 427; Allen v. Houhan, 175 Ill. App. 380.

The defendant next contends that the court abused its discretion in denying defendant's motion for leave to file an amended statement of set-off. The order of the court granting the defendant leave to file an amended statement of set-off within 10 days was entered October 10, 1914, and there is no claim that any further extension of time was ever asked for or granted by the court. On the 15th day

thereafter, November 5, 1914, the defendant presented his amended statement of set-off and moved the court for leave to file the same instanter. No excuse is offered for the failure to file the amended statement within the time allowed. We are therefore clearly of the opinion that there was no abuse of discretion in the court's refusing to grant defendant's motion.

Moreover, we are of the opinion that the amended statement of set-off did not present a claim proper to be urged by way of set-off. The items set forth therein are as follows: Keep, care and feed of one horse on farm 6 mos., $30 per mo., $180; care and feed of one collie dog on farm 6 mos., $15 per mo., $90; storage of wine, 8 mos., $30 per mo., $240; use of part of house and storage of furniture, 6 mos., $100 per mo., $600; total, $1110. From this it clearly appears that the claim did not arise out of the contract ~~xxx~~ sued upon by the plaintiff, and unless it is for liquidated damages, it cannot be urged by way of set-off. De Forrest v. Oder, 42 Ill. 500; Highbie v. Hunt, 211 Ill. 333; Clause v. Bullock Printing Co. 118 Ill. 612. It is alleged that the plaintiff accepted the services performed by the defendant, but it is not alleged that the plaintiff agreed to pay the prices set forth in the statement of set-off. Manifestly, the defendant was seeking to recover on an implied contract and could ~~xxx~~ recover only for the reasonable value of the services rendered, which was a question to be determined from the evidence. The claim was for unliquidated damages, (Ideal Coated Paper Co. v. Cupples Envelope Co., 169 Ill 484; Kelley Maus & Co. v. Gaffrey, 79 Ill. App. 278; Robison v.

Hibbs, 48 Ill. 408; Charnley v. Sibley, 20 C. C. A., 157.) and leave to file it was, therefore, properly refused.

Defendant next contends that his amended affidavit of merits alleged facts which constituted a defense to plaintiff's claim. It set up that defendant was a mere guarantor of the payment of the several sums specified in the contract sued on, and that the plaintiff had made no effort to collect from the principal debtors, or realize the amounts due out of the security, which was more than sufficient to pay the amount remaining unpaid. The contract expressly states that "Dr. E. J. Smedley hereby assumes and agrees to pay" the several sums therein mentioned. This language is clear and unambiguous, and is not susceptible of the interpretation put upon it by the defendant. The defendant was primarily liable and the amended affidavit of merits was therefore properly stricken from the files.

Finding no reversible error in the record, the judgment of the Municipal Court of Chicago will be affirmed.

AFFIRMED.

393 - ~~21356~~

ALFRED PARKER,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY and CHICAGO CITY RAILWAY COMPANY (impleaded with Rittenhouse & Embree Company).
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

200 I.A. 9

MR. JUSTICE O'CONNOR delivered the opinion of the court.

This was an action on the case brought by the appellee against the appellants and Rittenhouse & Embree Co. to recover for personal injuries. A judgment was entered for $3000 in favor of the appellee against the appellants. The jury returned a verdict of not guilty as to the defendant Rittenhouse & Embree Co. For convenience, the parties will be designated plaintiff and defendants as in the court below.

June 12, 1912, the plaintiff was a passenger on one of defendants' cars which was proceeding north in Wentworth avenue, Chicago. As the car was crossing 37th street it collided with a wagon loaded with lumber belonging to the defendant Rittenhouse & Embree Co., which was going east in 37th street. The plaintiff was standing on the front platform of the car and claims that he was thrown with great force and violence against parts of the car and was thereby severely injured.

The defendants first contend that the verdict is against the manifest weight of the evidence; that the clear

weight of the evidence shows that the collision of the car and wagon was so gradual that it created no disturbance of any consequence on the car; that the plaintiff was not injured as he claimed; that this appears from plaintiff's conduct immediately following the collisions in that he searched for his glasses in three different cars, went home without assistance, went to his shop for the seven days following, and did not call in a doctor until July 18th; that plaintiff's actions were wholly inconsistent with his having received any injury as claimed by him.

The evidence tends to show that the car in question was a large pay-as-you-enter type; that when it came in contact with the wagon one of the front wheels of the wagon was broken and the load of lumber slid or was thrown from the wagon; that the driver of the team was thrown or fell from the wagon by reason of the jar; that some of the glass in the front of the car was shattered, and that part of the frame of car was bent or broken. The car was being operated by a student motorman, with the regular motorman standing at his side giving instructions. Some of the witnesses testified that there were about four persons on the front platform, while others placed the number at from twelve to fifteen. The force with which the car struck the wagon was variously described by the witnesses as "terrific force," "great impact," "merely pushed" or "shoved" the wagon; "merely slid" against the wagon. A number of witnesses testified that immediately after the collision they saw plaintiff searching for his glasses, and none of them saw anything that would indicate that he was injured. Plaintiff testified that the car came in contact with the wagon with great force; that he was violently shaken and thrown against the

side of the car; that he felt nauseated and went into the car, sat down and held his head in his hands for a few moments; that he gave his name to the conductor; that he had a pain in his spine; that he told the conductor he was injured; that he searched around in two or three cars for his glasses, looking for a man who was said to have found them; that he then went home, was around several days feeling weak, and was complaining of his back; that he went to his place of business and did some work every day; that he went to the country for about a week; that on July 18th he was confined to his bed and remained there for about six weeks suffering great pain; that he afterwards was able to go about on crutches which he was compelled to use for two or three months when he was able to walk with a cane; that he has suffered more or less pain in his back since the accident; and that prior to the accident he was in good health. The plaintiff was still carrying a cane at the time of the trial, which was more than two years after the accident. The family physician was first called about July 18th. He found the plaintiff in bed complaining of pain in one of his limbs and back, and the plaintiff had a slight temperature. During the remainder of July the physician called two or three times a day and always found plaintiff complaining and suffering. There were no visible marks of injury on plaintiff's body; his back appeared to be slightly reddened. The physician testified that he at first diagnosed the trouble as sciatica rheumatism; that there were no torn muscles or ruptured ligaments, no bones broken; that he treated plaintiff the last time about November, 1911; that plaintiff was also suffering from neuritis; that in his opinion, the conditions found upon examination of the plaintiff might occur without any

violence, but that the neuritis from which plaintiff was suffering, in his opinion, was caused by an injury. Several witnesses testified that prior to the accident plaintiff was a strong healthy man; that after the accident they saw him using crutches, a wheel chair and a cane. The plaintiff was about 62 years old at the time of the trial. We are impressed by the fact that plaintiff appeared to be perfectly frank in his statements on the witness stand. His entire testimony appears straightforward and candid, and we feel that the jury was warranted in accepting his version of the matter. We have carefully examined all of the evidence in the record, and cannot say that the verdict is clearly and manifestly against the weight of the evidence.

The defendants next contend that the damages are excessive. We have heretofore discussed the evidence as to the nature and extent of plaintiff's injuries. At the time of the accident he was about 60 years of age, was healthy and active; he was engaged in the business of stair building and had been in such business for about 40 years and maintained a shop. The evidence tends to show that he was unable to attend to his business on account of his injuries, and was compelled to employ additional help. Following the accident he suffered great pain and continued to suffer more or less pain from the time of the accident until the date of the trial, and the jury might have reasonably inferred that his injuries were permanent. In view of all the evidence in the case, we cannot say that the amount of the verdict is excessive.

The defendants next contend that the argument of counsel for plaintiff to the jury was improper. In his opening argument to the jury counsel for plaintiff said:

"Of course, I cannot prove, and there is no evidence in here, of what he lost in his business, and I cannot give you that, for it would be improper.

Mr. Rosenthal: I object.

The Court: Objection sustained; if it is not here don't argue about it.

Mr. Hanes: It is not here and I am not arguing about it.

The Court: Then don't argue, don't mention it."

And continuing, counsel argued that the jury had a right to assume that since the plaintiff was still suffering, more than two years after the accident, he would continue to suffer, and that while plaintiff testified that he hoped and believed he would ultimately recover, such statement by plaintiff was not final or conclusive, but that the jury had a right to take the evidence in the case into consideration in determining the question whether the plaintiff would ultimately recover. Counsel then stated: "But I don't believe he will recover." The court overruled an objection to this aggument and said: "Counsel has a right to draw reasonable conclusions from the evidence; but the jury know what the evidence is."

From the foregoing it appears that the court properly sustained an objection to the argument as to possible loss of plaintiff's business, and told counsel not to mention the subject. As to the expression of the belief of counsel that the plaintiff would ultimately recover, there was no intimation that this was based on anything except the evidence in the case, and the error, if any, was harmless. State v. Bricker, 135 Ia.343. Furthermore the only ill effect of argument touching plaintiff's loss of business or the improbability of his ultimate recover, would be to unduly increase the amount of

the verdict. We have heretofore held that the verdict was not excessive and the defendants were, therefore, not harmed by these statements of counsel. Deal v. Heiligenstein, 244 Ill. 239.

In his closing argument counsel for plaintiff said: "Now there is some excuse for the man they ran into on the lumber wagon not being here, and we are not surprised after hearing this evidence to know that he is where he is.

Mr. Rosenthal: Just a moment--

Mr. Ranes: You are not surprised at that information--

Mr. Rosenthal: Just a moment--

Mr. Ranes: The force of that collision under the evidence here would explain very likely why he is where he is.

Mr. Rosenthal: That statement-- it can mean but one thing-- that the man died as a result of the injury, and I object to it.

Mr. Ranes: I didn't say anything of the kind.

The Court: Wait until the objection get into the record.

Mr. Rosenthal: That statement and the inference resulting therefrom not being based on the evidence in this case, I respectfully object to.

The Court: Objection sustained, and the jury will disregard it."

The argument of counsel as above set forth was clearly improper, and the court promptly sustained an objection to it and told the jury to disregard it. Under these circumstances, we cannot say that the judgment should be

reversed. City of Chicago v. Lonetch, 142 Ill. 642; Joliet Rt. Ry. Co. v. Call, 143 Ill. 177; Monmouth Mining & Mfg. Co. v. Erling, 148 Ill. 521; P. C. C. & St. L. Ry. Co. v. Kinnre, 203 Ill. 3381.

The defendants next contend that the court committed reversible error in giving to the jury instruction No. 12 on behalf of plaintiff, and instruction No. 14 on behalf of the defendant Rittenhouse & Embree Co.

Instruction No. 12 told the jury that the preponderance of the evidence is not to be determined alone by the number of witnesses testifying; that in determining the question of the preponderance, the jury may take into consideration the number of witnesses, their conduct and demeanor while testifying, their apparent intelligence or lack of intelligence, their interest or lack of interest in the result of the suit, if any, their opportunities for knowing the matters about which they testify, "and from all these circumstances determine on which side the preponderance of the evidence lies."

Instruction No. 14 enumerated certain things that the jury should take into consideration in determining upon which side the preponderance or greater weight of the evidence lies and told the jury that they should consider these, "in view of all the other evidence, facts and circumstances proven on the trial."

The particular objection urged to instruction No. 12 is that it "was misleading in that, while it advised the jury that in determining the preponderance of the evidence they might take into consideration the number of

witnesses, they were not told that it was the number of witnesses testifying in favor of either party as to a particular fact or state of facts that might be considered," and that it limited the jury in determining the question of the preponderance of the evidence to a consideration only of the elements mentioned in the instruction. The objection urged to instruction No. 14 is that it does not contain "the apparent consistency, fairness and congruity of the evidence," and that it omitted the element of the number of witnesses. Instruction No. 12 is subject to the objection urged that it limited the jury in determining the question of the preponderance of the evidence to a consideration of the elements enumerated. The jury should have been left free to consider all the evidence and all the facts and circumstances in evidence in determining where the preponderance or greater weight of the evidence lies. C. U. T. Co. v. Hamp, 223 Ill. 346; Brisch v. Chi. City Ry. Co. 176 Ill. App. 341; Myers v. Fuller Co., 167 Ill. App. 49; Larsen v. Ward-Corby Co., No. 30985, Appellate Court, First Dist. Instruction No. 14 is subject to the objection that the element of the number of witnesses was omitted. This element, however, counsel for the defendants concede was included in Instruction No. 12. By Instruction No. 14, the jury were told that in determining the question on which side the preponderance of the evidence lies, they should take into consideration "all the other facts and circumstances proved on the trial, if any." We are, therefore, of the opinion that these two instructions, while not strictly accurate when read together, are not so misleading as to warrant a reversal of the judgment.

Finding no reversible error in the record, the judgment of the Circuit Court of Cook County will be affirmed.

AFFIRMED.

216 - 22169

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

LOUIS ROSENBERG,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

200 I.A. 13

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant, Louis Rosenberg, charged with the crime of obtaining money by false pretenses, was found guilty and sentenced to imprisonment and fined. By this writ of error he seeks to have the judgment of the court reversed.

It is argued that the information is wholly insufficient. Under the statute - chapter 38, sec. 408, Hurd's Ill. Stat. - the accusation will be sufficient if it states the offense in the language of the statute, "or so plainly that the nature of the offense may be easily understood by the jury." The information charges that the defendant on a certain day, in Chicago, "did with intent to cheat and defraud and to obtain money by false pretenses, did obtain from the affiant the sum of one hundred and fifty dollars ($150) by falsely representing to this affiant that," - followed by averments in detail of a number of representations made by the defendant as to services performed by him and expenses incurred, and correlative averments denying that defendant had done each one of the things which he represented to have been done by him. The omission of the statutory word "designedly" is not fatal where the infor-

mation avers with particularity representations of things done, with a negative averment as to their performance; the existence of such facts would be impossible without knowledge and design on the part of the defendant; therefore knowledge and design will be implied.

The information was sworn to by Anna Myrtle Moss, and the averment that the money was obtained "from this affiant" is sufficient. It will be presumed that the money was in genuine money of the United States unless the information is challenged by motion to quash, which was not done in this case. This observation is also applicable to the objection that the information fails to specify the kind and value of money. We think it sufficiently appears that the person defrauded by the false representations was the person filing the information, and it also sufficiently appears that she relied upon the representations made to her. If the defendant made representations as to the things done by him, while the fact was that he did not do them, it would follow that he knew such representations were false. It will be presumed that the person filing the information owned the money which was obtainedfrom her. None of these objections go to the substance of the information, and as there was no motion to quash, the motion in arrest of judgment would not reach such defects in an information, for, as it was held in People v. Weber, 152 Ill. App. 102, whatever is included in or is necessarily implied from an express allegation need not be otherwise averred. See Maynard v. People, 135 Ill. 416.

Other points are presented which go to the proceedings before the court. None of the evidence has been preserved by a bill of exceptions, and it does not appear from the record that all of the proceedings in the trial

court are before us. Under such circumstances it will be presumed that there were proceedings before the court sufficient to sustain the judgment. The record shows that the defendant signed a waiver of trial by jury, and it is claimed that subsequently there was an attempt to withdraw this which was denied by the court. However this may be, in the absence of a complete bill of exceptions showing all the proceedings before the trial court, every presumption will be in favor of the regularity of the proceedings.

Other suggestions are made but are not of sufficient importance to require that the judgment be reversed. It is therefore affirmed.

AFFIRMED.

An information under sec. 408, chap. 38, Hurd's Ill. Stat. which omits the word esignedly" used in said section is not fatalla defective where the information ers with particularity representations of things done, with a negative averment to their performance: knowledge and design will be implied.

An information under sec. 408, chap. 38, Hurd's Ill. Stat., is sufficient which ers the money was obtained "from this affiart", or which fails to allege the ney was genuine money of the United States, or the kind and value of money, or at the person defrauded was the person filing the information, or that he relied the information given him, or that the defendant knew the falsity of his repre-ntations as to things done by him which he had not done, or that the person ling the information owned the money obtained from him: and a motion in arrest judgment will not reach such defects in the absence of a motion to quash.

Where none of the evidence is preserved by bill of exceptions, and the record ils to show all the proceedings in the trial court are before the appellate court, will be presumed there were proceedings before the lower court sufficient to stain the judgment, and every presumption will be in favor of the regularity of proceedings.

[illegible]ion under sec. 102, chap. 32, Hurd's Ill. Stat. while the word [illegible]ly" used in said section is not totally inoperative where the information [illegible] identity representations of illegs does, still a negative statement [illegible] performance; wrongdoing and injury will be inferred.

[illegible]ion under sec. 102, chap. 32, Hurd's Ill. Stat., is sufficient when [illegible] rogue was obtained "for this affiant", or which suits to place the [illegible] jurisdiction of the United States; or the civil and venue of action, or [illegible] certain information and the person filing the information; or that he relied [illegible] information given him, or that the defendant knew the falsity of the [illegible] as to which he was not true, or that the person [illegible] the information owned the money obtained from him; and [illegible] action in which [illegible] will not result such defects in the absence of a motion to quash.

[illegible] of the evidence is measured by bill of exceptions, and the record [illegible] when all the proceedings in the trial court are before the reviewing court, [illegible] measured where were proceedings before the lower court sufficient to [illegible] judgment, and every presumption will be in favor of the regularity of [illegible]

288 - 22243

THE UNITED STATES LITHOGRAPH CO.,
a corporation,
Plaintiff in Error,

vs.

AMERICAN IRONING MACHINE CO.,
a corporation,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

200 I.A. 17

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff by its statement of claim sought to recover a balance due for goods, wares and merchandise sold to defendant under a certain contract. Defendant by its affidavit of defense denies the making of the contract as alleged by plaintiff, alleges the making of another contract covering the same subject matter, in which plaintiff is in default and consequently indebted to defendant, for which it makes a claim of set-off for the amount of $190.10. Upon trial by the court the issues were found for the defendant as to plaintiff's statement of claim and for the plaintiff as to defendant's set-off. Plaintiff by this writ of error brings in review the record and judgment of the court, and defendant has filed cross-errors pertinent to its claim of set-off.

There is no serious dispute as to the facts giving rise to the controversy. Plaintiff is engaged in the lithographing business at Norwood, Ohio; the defendant is located in Chicago. In the fall of 1913 Mr. F. L. Wilke, a Chicago salesman for the plaintiff, called several times upon the defendant and solicited an order for a quantity of lithograph displays or, what are called in the trade, "cutouts." After negotiations defendant placed with Mr. Wilke an order written on one of the printed forms of the de-

fendant. This order was not accepted by plaintiff, which made out an order on one of its own printed blanks and through its salesman, Mr. Wilke, this latter order was presented to defendant and signed by it. This order, which is quite long, containing a number of specifications and details, was for 2,000 cutouts at a price of 65 cents each, totaling $1,300. At the bottom of the order, which was printed in part and partly typewritten, was this clause: "Subject to acceptance in City of Norwood, Ohio, by the United States Printing & Lithograph Co., sole sales agent." (The difference between this name and the name of the plaintiff is immaterial.) In reply to this order plaintiff sent to defendant a purported acceptance, which in several particulars was not in accord with the terms of the order. Immediately upon receipt of this defendant wrote to plaintiff noting the variances and asking plaintiff to acknowledge receipt of the letter, "as the order is somewhat at variance with your acknowledgment." To this plaintiff replied, saying, "We did not reply to yours of January 3rd, having referred same to our Chicago office to take up with you." Subsequently Mr. Wilke of the Chicago office of the plaintiff called upon defendant to settle the matters raised in the above correspondence. At this and a subsequent interview the defendant, acting through its president, Mr. Grosse, and Mr. Wilke, representing the plaintiff, entered into an oral contract as follows: The defendant agreed to purchase from plaintiff 1,000 cutouts, defendant to pay plaintiff $900 therefor, the whole 1,000 cutouts to be billed and paid for immediately, the cutouts to be kept in storage by the plaintiff and shipped to the defendant in lots of about 250 at such times as the defendant should call for them. Subsequently 511 of these cutouts were shipped to and

accepted by the defendant, and a bill for 1,000 cutouts was rendered the defendant in March, 1914, for $653, which was paid. Under the oral contract for 1,000 cutouts 489 more were due to the defendant. Plaintiff did not ship this number but shipped 1,600 cutouts in a single shipment and insisted upon the defendant accepting the same. No opportunity was given defendant to accept the balance due on its contract for 1,000 cutouts, that is, 489. The defendant refused to accept this shipment from the railroad company.

Plaintiff claims the existence of a contract of purchase for 2,000 cutouts. Defendant maintains that the only contract made between the parties was the oral contract for 1,000 cutouts, and that as it has advanced payment for cutouts not delivered, it is entitled to recover on its set-off.

We are of the opinion that the writings between the plaintiff and the defendant did not amount to a contract. Plaintiff argues and predicates its claim upon the assumption that the writing dated December 19, 1913, which is the order for 2,000 cutouts, was the contract of the parties. This however is error, as it appears clearly from the language of this order that it was merely an offer made by the defendant, and in terms it is made subject to the acceptance in Norwood, Ohio, by the United States Printing & Lithograph Co. Whether or not this order would be accepted was uncertain, and until it was definitely and without modification accepted it was not a valid contract. This would seem too clear to require argument. A case directly in point is Holder v. Aultman, 169 U. S. 81. The purported acceptance by the plaintiff in reply

to this order varied from the terms of the offer, and therefore created no contract but amounted to a rejection and left the offer no longer open. In vol. 9 Cyc., p. 287, is a long list of decisions supporting the proposition that an acceptance to be effectual must be identical with the offer and unconditional. Where one offers to do a definite thing and another accepts it conditionally or introduces a new term into the acceptance, his answer is either a mere expression of willingness to negotiate further or it is a counter proposal, but in neither case is there a contract. This rule is supported by such an abundance of authority as to make further comment unnecessary. This is also the rule even if the differences may not be of great importance in the mind of one of the parties. The test as to the fact of a contract does not depend upon the greater or less degree of difference between the parties; the acceptance must be in the identical terms contained in the offer.

The situation, therefore, was, when Mr. Wilke called upon the defendant pursuant to instruction from the plaintiff's home office and its letter to defendant, that the matter was entirely open, and the parties through their representatives were competent to make such agreement or contract for the purchase of cutouts as might be mutually agreeable. That the contract was then made between these parties for the purchase of 1,000 cutouts is not seriously disputed. By its letter of January 9, 1914, stating that the Chicago office would take up the matter with defendant, plaintiff is estopped to deny the authority of Mr. Wilke of its Chicago office to make the contract. By this letter defendant is informed that the matter had been referred to the Chicago office for settlement. It cannot repudiate this

authority. In Marx et al. v. King, 162 Mich. 258, it is said: "that if one party refers another to a third person for information, as authorized to act or answer for him, he will be bound by the actions and statements of the person so referred to." Plaintiff's argument as to the authority of Mr. Wilke proceeds upon the assumption that on the date of the letter of January 9th there was a contract between the parties, and upon this assumption it argues that parol evidence cannot be permitted to vary the terms of a written contract; but as we have above stated, at this time there was no contract between the parties, and Mr. Wilke had authority to make such contract as might be agreed upon.

The court was asked to hold as a proposition of law, substantially, that when a principal permits a person to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the face of such appearances. This proposition correctly stated the law and should have been given by the court.

We hold that when plaintiff shipped 1,600 of these cutouts, insisting that the written documents were the real contract and that the purchase was for 2,000 cutouts, it repudiated the contract for 1,000 cutouts. Defendant, therefore, was entitled to treat the contract as breached and to sue for damages. Its contract was for 1,000 cutouts, for which it was to pay $900. It received 511 of these, which the evidence shows were worth $459.90. It has paid plaintiff $650, and is therefore entitled to recover the difference between these amounts, which is $190.10. The judgment of the trial court was correct as to plaintiff's statement of claim,

but a finding should have been made for defendant for the amount claimed in its set-off. The judgment of the trial court will be reversed and judgment will be entered in this court for the defendant against the plaintiff for $190.10 with costs.

REVERSED AND JUDGMENT HERE.

282 - 22237

SALVATORE DE SALVO, Defendant in Error, vs. ARTHUR R. ANDERSON, Plaintiff in Error.	ERROR TO THE MUNICIPAL COURT OF CHICAGO.

200 I.A. 29

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant and plaintiff entered into a contract for the sale by defendant to plaintiff of certain real estate designated as number 1117 West Ohio Street, Chicago. The consideration recited in the contract to be paid by plaintiff is $7,250. The contract also recites that $500 was paid as earnest money, and that on the passing of the conveyance and closing of the transaction the remaining sum due on the purchase price should be liquidated by the payment by plaintiff to defendant of $1,000 in money and the giving of a first mortgage for $4,000 and a second mortgage for $1,750, secured upon the premises sold. The contract and earnest money were to be held by Navigato Savings Bank in escrow for the benefit of both parties to the contract. James R. Navigato, of the bank bearing his name, was the agent who negotiated the sale and procured the contract to be signed by the parties to it.

Plaintiff has failed to join in error or argue the cause.

On a trial before the court plaintiff had judgment for $500, which defendant asks this Court to reverse. Plaintiff refused to carry out the contract and demanded the return of the earnest money on the contention that he had been induced to sign the contract to purchase the property by false and fraudulent representations made to him by

James L. Navigato and the defendant. The representations alleged to have been false concerned taxes for the year 1913, which plaintiff claims should have been prorated from January 1, 1913, to the date of the closing of the transaction, and which would amount to about $80 in favor of plaintiff; and the further representation that there would be no extra charge for a mortgage of $5,750, whereas, it is claimed, an expense in this regard amounting to $150 was to be made. The amount of $5,750 referred to in the statement of claim evidently covers the mortgages of $4,000 and $1,750 recited in the contract. We think the finding and judgment are contrary to the evidence and the law applicable thereto.

It seems that plaintiff is by birth an Italian and had at the time of this transaction lived in this country ten years. He claims that he did not understand the English language. Navigato, who procured plaintiff's signature to the contract, spoke the Italian language, and it is in evidence that at the time the contract was signed the parties present spoke in Italian and not in English. Plaintiff paid the earnest money to Navigato and not to defendant, and he paid it at the instance of Navigato at the time he signed the contract.

Neither in the evidence nor in the statement of claim does it appear that any subterfuge was resorted to to prevent plaintiff from fully understanding the terms of the contract which he signed. Defendant did not speak Italian at the signing of the contract and it does not appear that he could speak that language. Nor is it claimed in the evidence that defendant made any representation to plaintiff which induced him to sign the contract nor any statement in relation to it or its terms contrary to such terms. Nor does

it appear that plaintiff interrogated defendant regarding the terms of the contract. There is nothing in either the statement of claim or in the evidence in this record which justifies the inference that fraud or fraudulent conduct was resorted to by defendant or those representing him in the matter to induce plaintiff to execute the contract. Neither fraud in fact nor fraud in law is inferable from the proofs in the record.

The representations claimed to be fraudulent relate to the taxes and the expense of the two mortgages provided for in the contract; we regard them as being more in the nature of promises to be carried out in the future, than as representations of any existent fact. Such representations, if made, would not constitute fraud, even though plaintiff was induced to enter into the agreement relying upon such representations. Day v. Investment Co., 153 Ill. 293.

It is not sufficient to allege fraud. Fraud must be proven like any other fact, and the acts or things done which in law constitute fraud must be proven by a preponderance of the evidence, the same as any other material fact in a suit at law. Mchenman v. Mickelberry, 242 Ill. 117.

Fraud is never presumed. When transactions may be fairly reconciled with honesty and when the weight of the evidence favors an honest motive, the conclusion of integrity should always be adopted. The contract here involved, in the light of the testimony expresses the honest intention of the parties and their agreement, and cannot therefore be said to be tainted with fraud.

We hold the plaintiff has neither stated nor proven a cause of action against defendant, and we there-

fore reverse the judgment of the Municipal Court and enter a judgment in this Court of nil capiat and for costs against plaintiff.

REVERSED WITH JUDGMENT OF NIL CAPIAT.

316 - 22271

JOHN H. LAWRENCE and
EDWARD F. LAWRENCE, doing
business as LAWRENCE
BROTHERS,
Appellants,

vs.

WILLIAM WENDNAGEL and
CHARLES E. E. WENDNAGEL,
doing business as WENDNAGEL
& COMPANY,
Appellees.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

200 I.A. 32

MR. JUSTICE HOLMES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of nil capiat and for costs in a trial before the Municipal Court without the intervention of a jury.

The facts involved are, that defendants had a contract with plaintiffs for certain structural steel work at Sterling, in this State, under which plaintiffs were authorized to retain out of any moneys due defendants at any time sufficient to indemnify plaintiffs against any claim or lien for which they or their property might be liable. On November 24, 1911, one David O'Keefe threatened a suit at law against plaintiffs for personal injuries claimed to have been suffered in and about the erection by defendants of the structural steel work for plaintiffs. Plaintiffs claimed the right to retain about $4,000 due defendants to await the result of O'Keefe's threatened suit. Defendants not only denied liability, but also the right of plaintiffs to retain the money then due them. The parties to this suit settled this controversy by defendants giving to plaintiffs a bond of indemnity in the penalty of $4,000, conditioned that defendants should hold plaintiffs harmless from and against all liability for personal injuries sustained by any and all per-

sons as the result of the carelessness or negligence of defendants, their agents or employees, in and about the performance by defendants of their contract with plaintiffs, agreeing to pay plaintiffs "all damages resulting or arising from such negligence, which may hereafter be assessed against them in any action brought by any such person or persons, then this obligation to be void," etc. O'Keefe, true to his threat, sued plaintiffs in the Circuit Court of Whiteside County for damages for the personal injury which he claimed he suffered while engaged about the structural steel work being erected by defendants under their contract with plaintiffs. Plaintiffs defended the O'Keefe suit successfully and this suit is instituted in debt upon the indemnity bond hereinbefore referred to, in an effort to recover from defendants attorney's fees, witness fees, and other expenses paid by plaintiffs in their successful defense of the O'Keefe suit, with interest upon all of such disbursements. The attorney of defendants assisted in the defense of the O'Keefe suit by advising plaintiffs' attorney regarding the pleadings and, at one time, as to the advisability of procuring a continuance, also as to the advisability of employing additional counsel to help in the trial of the case and the propriety of procuring medical testimony on the theory that O'Keefe was malingering. Defendants' attorney was also present at the trial, although he took no active part in it. He had what the English bar terms a "watching brief." It also appears that in a motion to instruct a verdict for plaintiffs in this suit, defendants in the O'Keefe suit, the name of defendants' attorney was coupled with those of plaintiffs' attorneys. After the verdict of the jury in favor of plaintiffs was returned, de-

fendants' lawyer wrote plaintiffs' attorney a letter of congratulation, expressing his wonder whether the verdict was based on the legal question or on the fact that O'Keefe was "shamming."

The contract between the parties and the bond of indemnity were two different transactions. When the bond was given and accepted and the money due under the contract to defendants was paid to them, that contract and all its conditions were satisfied and the relations of the parties thereunder settled and ended. The right to retain the money due under the terms of the contract until the outcome of the O'Keefe threatened litigation, was waived and the bond of indemnity in suit substituted in its place. Thereafter the rights of the parties must be admeasured by the conditions of the bond.

Nothing can be read into the bond which does not actually appear in it or that is not warranted by legal interpretation of the language used to express the intention of the parties, which intention must be gathered from such language. If plaintiffs had desired to have the bond cover their costs and expenses in defending the O'Keefe or any other suit, and defendants had been willing to yield to such desire, a suitable covenant to that effect could have been inserted. Liability cannot be extended by construction. By the covenants of the bond the parties thereto are bound. Whether the canon of construction contended for by plaintiffs, - that the conditions of the bond be construed most favorably to plaintiffs because the bond was drawn by defendants and proffered by them to plaintiffs - or the reasonable interpretation of the words found in the bond be indulged, the result will be the same.

The covenant is limited to "all damages resulting or arising from such negligence which may hereafter be assessed against them in any action brought by any such person or persons." No damages have been assessed against plaintiffs; on the contrary, in the O'Keefe case the verdict and judgment exculpate them from damages. We do not find anything in the conduct of defendants that would warrant us in holding that they had put any other or different interpretation upon the conditions of the bond than the law would but for such conduct place thereon. It was to the interest of the defendants to do all legitimately in their power to defeat the action of O'Keefe against plaintiffs, because if a judgment had gone against plaintiffs the defendants would have been liable under their bond to pay the amount of the bond within the limit of its penalty. To prevent O'Keefe from recovering a judgment against plaintiffs was the sole purpose of defendants' interest and efforts. By their joint efforts they succeeded. That success satisfies the condition of the bond and absolves defendants from all liability thereunder.

The action of the trial judge in refusing to hold as law applicable to the case the propositions of law tendered by plaintiffs was without error. The doctrine of estoppel was not invokable against defendants. The contract, as heretofore stated, was out of the case. The obligations of the contract and bond were dissimilar. Each stood separate and apart from the other and subserved separate and distinct purposes.

There is no reversible error in this record, and the judgment of the Municipal Court is affirmed.

AFFIRMED.

200 I.A. 38

Massachusetts Bonding & Insurance Co., Equitable Surety Co., Illinois Surety Co., Globe Indemnity Co.,

full amount of the [illegible],000.

The Southern Surety Company filed its bill against the City of Chicago, the bank, its receiver, and the other sureties on its bonds, in which it set up the giving of the bonds by the bank, its own liability as surety, and the receipt of securities by the city from the bank. It offered to pay the City of Chicago the maximum amount for which it was responsible, and asked that it be subrogated to the rights of the City to a proportionate part of the securities. To this bill answers were filed by the City, the receiver for the bank, and all sureties on its bonds except the American Surety Company, which filed a demurrer. The receiver of the bank filed his cross bill July 17, 1917, and an amended cross bill March 28, 1918, in which he prayed that Michael J. Flynn, City Treasurer, might be required to deliver to him all the securities in question.

July 30, 1914, Michael J. Flynn filed an original bill in the Superior Court, in which he set up the matters already stated in regard to the deposit of funds with the bank, the taking of indemnifying bonds, the obtaining of additional securities, and the subsequent failure of the bank; also that the various surety companies had no right to be subrogated to the City's interest in the securities and that the bank and its receiver claimed an interest in the same. He asked that the court decree that the bank or its receiver may thereupon sue right be substituted by Flynn, Treasurer, that in default he be directed to sell the collateral, apply the proceeds on the balance of the indebtedness to the City of Chicago from the bank, and make disposition of the surplus, if any, to such creditors of the bank as may have a right to enter into the court. This bill made the Southern

Surety Company and the other sureties on the bondsmen's bond, parties defendant, as well as the receiver for the bank, answers were duly filed; and in this suit also, the receiver filed a cross bill containing the same allegations and prayer for relief as were set out in his answer bill filed in the case of Southern Surety Company v. City of Tulsa. Since July 1, 1932, Flynn, by leave of court, amended his bill by inserting a prayer for the appointment of a receiver pendente lite. To this amendment was attached the affidavit of one [illegible], First assistant treasurer, in which he stated that Flynn was no longer City Treasurer, but had been suspended by the Council. Thereafter, on March [illegible], 1933, an order was entered consolidating the two cases under the name of Michael J. Flynn, City Treasurer v. Southern Surety Company. On [illegible] 1933, on motion of complainant Flynn and without defendant surety companies, an order was entered appointing a receiver from this order, William F. McCaul, as receiver of the [illegible] Street Trust and Savings Bank, took this appeal.

In view of the fact that the complainant's term of office had expired, and that he was, at the time of the entry of the order, in possession of some [illegible] worth of assets in which he had no interest, personal or official, the appointment of a receiver was necessary for the proper protection of the appellant as well as that of the surety companies.

[illegible] unable to see the force of the contention that "the appointment of the receiver without requiring the moving parties to post a bond was erroneous." And the moving parties succeeded in both the lower [illegible] obtaining title or interest in the assets, a different question would be presented, but the question here was one of the

moving parties. It was obviously to the advantage of all the parties claiming an interest in the securities that they be taken out of the hands of an unbonded stake-holder and placed in the hands of a receiver who would secure the interests of the parties by giving a bond, and who would be in all things subject to the direction of the court. These circumstances clearly constituted "good cause," within the meaning of the statute, for the appointment of a receiver without requiring the moving parties to give a bond. Nor do we think the suggestion that the District Court, which had jurisdiction of the winding up of the bank, was the proper tribunal to adjudicate the rights of the parties to the securities, has any bearing on the question of whether the court should or should not appoint a receiver. No controversy was over within the constitutional jurisdiction of the Superior Court, and its jurisdiction of the particular controversy was not raised by the appellant. But, on the contrary, he after answering the original bill filed his cross bill in which he asked affirmative relief. Had the appellant, by proper pleadings, raised a jurisdictional question, it would still have been the duty of the court to ascertain the subject-matter of the litigation until that question could be properly decided.

Counsel for appellant further contends that the facts disclosed by the record show that the securities in question belong to the bank, and that, therefore, a receiver ought not to have been appointed. To this we cannot agree with this contention nor the reason that the question of the rights of the parties, whether it presented itself as a question of fact or a question of law, was one which the Chancellor could not properly determine until fully advised in court, and until fully advised, it was his duty to take steps to preserve

the subject-matter of the controversy.

[illegible]

[illegible] chancellor in travelling a massive [illegible]

[illegible] will be affirmed.

[illegible]

337 - 21322.

ARMIN W. BRAND et al., Appellants, vs. JOHN H. F. RUETER et al., Appellees.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

200 I.A. 42

MR. PRESIDING JUSTICE BAUMAN DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree dismissing for want of equity an amended bill of complaint filed in a suit to foreclose a trust deed executed by Rueter and his wife, Winnie, to secure his four notes dated Sept. 1, 1892, one for $5000 and three for $1000 each.

The principal questions presented are, was the suit barred by the statute of limitations, and was the transaction usurious? The decree appears to have been entered on an affirmative answer to one or both questions, whereas we think both should be answered in the negative.

In our opinion the amended bill, filed Dec. 24, 1913, does not state a different cause of action from that stated in the original bill, filed Jan. 3, 1913. If, therefore, the final payment of interest was made Feb. 6, 1903, the suit was brought within the statutory period of ten years.

By extension the notes matured Sept. 1, 1900. The semi-annual interest of $280 was paid regularly up to Sept. 1, 1899. On March 1, 1900, $80 was paid and credited. On Feb. 2, 1902, $8000 was paid and applied first, to liquidate the accrued interest on all the notes to that date, next, to the payment of the note for $5000 and

one note for $1000, and then to the reduction of the other two notes to $635 each. Such application was proper, especially in the absence of any direction by the debtor. (Monson v. Meyer, 190 Ill. 105.)

Being importuned for interest in the fall of 1902, Rueter in December or January following gave the agent of appellant, Armin W. Brand, holder of the notes, a note for $50 of a third person payable to the order of, and endorsed by, Rueter, which was collected on Feb. 6, 1903, and credited of that date, of which Rueter was notified. The record discloses no agreement to accept the note as payment of any part of the debt, and no circumstances that raise a presumption that it was so taken. It would therefore be deemed conditional payment only, (Cheltenham Stone & Gravel Co. v. Gates Iron Works, 124 Ill. 623) and as of the date when it was collected. On the date of filing the original bill, therefore, the statute had not run.

Rueter borrowed the money to improve one of the lots conveyed by the trust deed. He applied to one Blumenthal, a mortgage broker, for the loan, and agreed to pay him a commission of 2½% and the expenses connected therewith such as examining abstract, recording, etc. The latter submitted it to one Michael Brand, who looked over the property, accepted the security, and gave Blumenthal his check for the amount of the loan, $2000. Blumenthal deducted therefrom $200 for his commission and paid out the balance to Rueter's contractor on Rueter's orders. Rueter requested Blumenthal to get an extension of time as aforesaid on the notes, which was done and for which he paid Blumenthal another commission of $200. No part of either commission was received by the lender, Brand. During the year 1892 Blumenthal made other loans for said Brand and he collected

the interest on the notes in question while said Brand owned them. They became the property of appellant, Armin F. Brand, in 1899, after which the payments thereon were made to the latter's agent. Neither the lender nor subsequent owners of the notes received or agreed to receive more than the legal rate of interest thereon. The compensation paid to Blumenthal for negotiating the loan and procuring an extension of the time of payment, was according to contract between him and the borrower, with which the lender had no connection and of which he had no knowledge. The essential facts of this case are not different from those in the case of Hoyt et al. v. Pawtucket Institution for Savings et al., 110 id. 390, which were held not to constitute a usurious transaction. (See also, Gantzer v. Schmeltz, 206 id. 560; Lanford v. Kane, 133 id. 199.)

Evidence was received tending to show that Blumehthal had not taken out a license as required by the ordinances of the City of Chicago, which might be relevant if Blumenthal was suing for his commissions, but which is not relevant to the issues here.

There was also evidence that the notes were signed Sept. 3, 1892 and dated Sept. 1, 1892 and that the original loan was not paid over to Blumenthal until Nov. 10, 1892, but that the interest was paid thereon from the date of the note. The record does not disclose whether the lender held the money for Rueter's use from the date of the note. The arrangement between him and the lender in that respect was not shown. Brand agreed to make the loan before Sept. 1st. If he held the money for Rueter's use from that date the transaction was not tainted with usury by paying interest from that time. The burden of proving usury was on the debtor, and was not established. (Cobe v. Guyer,

237 id. 516.) Besides the interest, if usurious was paid before maturity and before the transfer of the notes to the present holder. (Culver v. Osborne, 231 id. 104.)

The decree will be reversed, and the cause is remanded for entry of a decree on the amended bill in harmony herewith.

REVERSED AND REMANDED.

411 - 21398

JAMES J. RYAN,
Appellee,

vs.

CHICAGO FOUNDRY COMPANY,
a corporation,
Appellant.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

200 I.A. 45

MR. PRESIDING JUSTICE BAUMAN DELIVERED THE OPINION OF THE COURT.

This was a suit in assumpsit, brought in the County Court, and based upon an award made for appellee against appellant under the Workman's Compensation Act of 1911, which was signed by only two of the three arbitrators appointed thereunder.

Invoking the common law rule, appellant urges that the award was void because not signed by the three arbitrators. Section 10 of said act contemplates joint action by a board of arbitrators appointed thereunder; and it is provided in paragraph 9, section 1 of chapter 131 R. S., relating to the construction of statutes, that

> "Words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or persons."

Construing the Compensation Act with the aid of this section, we think the award was authorized.

It is also contended that the case does not come within the class of cases of which the County Court has jurisdiction. As that court has jurisdiction in all actions where assumpsit will lie and the damages do not

exceed $1000 (Sec. 7 County Court Act, Ch. 37 R. S.; and Par. 6, Art. 2, Ch. 79 R. S.) and as assumpsit is a proper remedy on an award (McDonald v. Bond, 195 Ill. 132,) and the award declared on was for less than $1000, and the judgment for $301.25 does not exceed the amount of the award, the point is not well taken.

The court properly excluded offers of evidence bearing on the question of whether the defendant company was liable under the Workmen's Compensation Act, as it was not relevant to the issue presented by the declaration. The judgment will be affirmed.

AFFIRMED.

23 - 21598

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

ABRAHAM GLICK,
Plaintiff in Error.

ERROR TO CRIMINAL COURT, COOK COUNTY.

200 I.A. 46

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was indicted for larceny and receiving stolen property, the value of which exceeded fifteen dollars. He pleaded not guilty and the case proceeded to trial. There appearing to be a variance, the state's attorney asked for a continuance and the defendant for his discharge. The court suggested a plea to a misdemeanor if the defendant was "willing to take a chance to take a year in the House of Correction." At the conclusion of some discussion between the judge and the counsel, the attorney for defendant remarked, "I think the best thing, your Honor, will be to withdraw the jury." Thereupon without further remarks the court said: "On motion of the defendant, the jury withdrawn and the defendant's plea of not guilty withdrawn and the defendant's plea of guilty entered, and the defendant warned and sentenced to the House of Correction for one year and fined one hundred dollars and costs."

No explanation of the consequences of the plea of guilty (if we assume one was properly entered) was made by the court, and no witness was examined as to the aggravation or mitigation of the offense. The statute required both. (Sec. 4, Div. 13, Criminal Code, Krolage v. People, 224 Ill.

456.) If we may assume from the bill of exceptions that the calling of witnesses was waived, and that defendant acquiesced in the entry of a plea of guilty and a sentence to a year's imprisonment, still we can not regard the court's remarks above quoted as a compliance with section 4, Div. 13 of the Criminal Code requiring that the plea of guilty "shall not be entered until the court shall have fully explained to the accused the consequences of his plea," especially when the punishment imposed exceeded that which the court intimated might be given. The court at one point of the discussion referred to the "maximum" penalty, but does not appear to have explained to the accused what it was. The proceeding was too loose to be countenanced as a compliance with the statute or a precedent in a case where one is deprived of his liberty. Therecord as made by the clerk shows a compliance with the statute, but it will not prevail as against what is shown in opposition to it in the bill of exceptions. (I. D. & W. Ry. Co. v. Hendrian, 190 id. 501; McChesney v. People, 174 id. 46.)

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

185.) If we may assume from the bill of exceptions that the ruling of counsel was waived, and that defendant acquiesced in the entry of a plea of guilty and a sentence to a year's imprisonment, which we can not regard the record's remarks above quoted as a consistent with section 1, Div. 12 of the Criminal Code requiring that the plea of guilty "shall not be entered until the court shall have fully explained to the accused the consequences of his plea," especially when the accused [illegible] the court intimated what may be given. The court in one point of the discussion referred to 5 a Tennessee penalty, but had not agreed to have explained to the accused that it was. The prosecuting was too loose to be countenanced in a tribunal with the records of a proceeding in a case where one is deprived of his liberty. Unnecessary as made by the plea shows a compliance with the contrary, but it will not prevail as against what is shown in opposition to it in the bill of exceptions. Cf. 1. R. R. Div. 12. v. Hutchins, 1 Ala. 551; Hutchinson v. Wright, 1 Ala. 40.)

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

27 - 21257

OLD ROSE DISTILLING COMPANY,
a corporation,
Defendant in Error,

vs.

ELIZABETH PARKHILL,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

200 I.A. 48

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Defendant in error (plaintiff below), brought an action of forcible entry and detainer against plaintiff in error (defendant below), for the possession of certain premises; plaintiff's right of possession being based upon a lease entered into with one McGivern, the owner thereof. The court having found the issues for the plaintiff, and having entered judgment thereon, defendant brings error.

This suit is the aftermath of a similar proceeding for the possession of the same premises, brought by the said McGivern against the defendant, wherein the court also found against the defendant, which judgment was later affirmed by this court upon a writ of error. McGivern v. Elizabeth Parkhill, Ill. App., Gen. No. 20826.

It is urged that during the pendency of the writ of error in McGivern v. Parkhill, supra, the present action should have been abated. It is a sufficient answer thereto to say that this question should have been raised in the court below, and comes too late when raised here for the first time. (Hailman v. Buckmaster, 8 Ill. 498). Furthermore, the pendency of a writ of error cannot be invoked to abate another similar action unless the former operates as

a supersedeas. (McJilton v. Love, 13 Ill. 486). A supersedeas having been denied in McGivern v. Parkhill, supra, defendant's contention that the present suit should have been abated is without merit.

In the present action H. J. Parkhill, the husband of the defendant, was originally the sole defendant. Subsequently his wife, the defendant herein, was made a joint defendant. Later, however, H. J. Parkhill was dismissed, and the case proceeded against the defendant alone. It is urged that this substitution of parties defendant constituted a new cause of action. Such, however, is not the law. Metropolitan Ins. Co. v. People, 209 Ill. 42; Thomas v. Fame Ins. Co., 108 Ill. 91.

Defendant has also raised other points, which were adjudicated in McGivern v. Parkhill, supra, and hence they will not be considered here.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

44 - 21361

MARY HOEFT,
Defendant in Error,

vs.

JOHN HOEFT,
Plaintiff in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

200 I.A. 49

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

On July 15, 1911, defendant in error (complainant below), was granted a default decree of divorce, on the ground of desertion. On the day the said decree was entered, plaintiff in error (defendant below), presented a motion to set aside the decree, and for leave to file his answer, which said motion was entered of record and continued. On March 4, 1912 defendant presented his sworn answer to the bill and an affidavit in support of said motion. The court overruled said motion, and to review this action of the court, this writ of error has been prosecuted.

It is contended by the defendant that the court, in overruling said motion, abused its discretion. Underlying this contention is the claim of the defendant that his affidavit and sworn answer set forth a meritorious defense to complainant's bill. We cannot agree with this contention.

The answer filed by defendant denied the wilful desertion and its continuance without reasonable cause, as set forth in the bill. Said answer admits, however, that the defendant had been living separate and apart from the complainant from the date of desertion alleged in the bill

(November 4, 1907) to March 4, 1912, the date the affidavit and answer were presented to the court and the motion denied. Defendant, in his answer, seeks to justify his long absence from his wife, on the ground that she had caused his arrest on a charge of disorderly conduct; that when that suit was nolle prossed, the justice of the peace before whom it was pending, warned him (defendant) that complainant wanted him to stay away from her. Such action on the part of the said justice of the peace, not shown to have been concurred in by the complainant affords no justification for defendant's continued absence. Defendant's answer further alleged that prior to the desertion in question complainant's adult sons had threatened to take his life if he did not leave the home of complainant, after which he did leave and stayed away for some time, believing that said threats would be carried out; that complainant knew of said threats, and consequently had her two sons arrested; that following his arrest of November 4, 1907 he feared a renewal of hostilities on the part of complainant's said adult sons; that because of the fear of these sons and the warning of the court, he stayed away. Such conduct on the part of her children can not be attributed to the complainant unless it be shown that she aided and abetted therein. The answer itself indicates that such was not the case, for it alleges that complainant had caused the arrest of her two sons because of these threats made against defendant.

From a careful examination of the record, we are unable to say that the court abused its discretion in overruling defendant's motion to vacate the decree, and for leave to file the answer in question. Accordingly the decree will be affirmed.

AFFIRMED.

385 - 21372

EDWIN J. BOWES, Jr., et al.,
Appellants,

vs.

EUGENE S. PIKE,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

200 I.A. 51

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellants (complainants below), filed a bill to restrain appellee, Eugene S. Pike (one of the defendants below), from entering judgment upon a note for $1,250, dated February 1, 1908, due six months after date, with interest at the rate of 6% per annum from date. By stipulation, defendant, Pike, whom we shall hereinafter designate as the cross-complainant, was permitted to file a cross-bill in said cause, wherein he prayed that a decree be rendered in his favor for the amount due him on the note in question. Allegretti (the other defendant below), was dismissed from the suit by consent of the parties. Upon a hearing of the cause thus consolidated, the chancellor found the issues for the cross-complainant, and entered a decree in his favor for the sum of $1,776, being the amount then due on said note, and dismissed complainants' bill for want of equity. From this decree, complainants appeal.

By virtue of a lease dated January 29, 1907, between the cross-complainant and Allegretti, the latter had a ten-year leasehold on certain premises therein mentioned, located in the City of Chicago. About the time of the execution of said lease, Allegretti organized a corporation bearing his name, to which he forthwith assigned the lease

in question. By an arrangement with Allegretti, the complainants subsequently became stockholders of the Allegretti company.

The note in question was signed by complainants and Allegretti, as makers, and was given for accrued rent which the company owed the cross-complainant under the lease hereinabove mentioned. Prior to the maturity of said note, the complainants transferred their stock in said company to Allegretti, who, in consideration therefor, agreed, inter alia, to indemnify and save harmless said complainants from liability on said note.

~~Appellants~~ Cross-complainants contend that the cross-complainant was fully informed of the last above-mentioned agreement and assented thereto; that when the note in question matured on August 1, 1908, cross-complainant and Allegretti, without the knowledge or consent of the ~~appellants~~ cross-complainants, entered into a binding agreement, extending the time of payment thereof for the period of one year from said date, by reason whereof the ~~said appellants~~ cross-complainants were released from liability. The chancellor found that ~~the appellants~~ cross-complainants had failed to establish, by a preponderance of the evidence, that a binding extension agreement had been entered into, and it is urged ~~by the appellants~~ that such finding is clearly and manifestly against the weight of the evidence.

On behalf of ~~the appellants~~ cross-complainants, Allegretti testified, by way of a deposition, that when the note in question became due, he had a talk with cross-complainant, in which he asked for an extension of time on said note for one year, and that the cross-complainant granted the extension; that he (Allegretti) agreed to keep this money and pay interest thereon, for one year; that cross-complainant did not make any demand for payment of this note before the end of the

year; that just before August 1, 1909 he received a letter from cross-complainant, relative to the payment of this note on August first, to which he replied in substance, that he had received cross-complainant's letter; that it would be impossible for him to comply with his wishes regarding the note, but that he would bring in as much as he could by the first of August. He further testified that the time of payment of this note was subsequently extended from time to time; that he paid the interest on said note after the first year's extension, as agreed; all of which was without the knowledge or consent of ~~the appellants~~ complainants.

Edwin J. Bowes, another witness on behalf of ~~the appellants~~ complainants, whose testimony was also submitted by way of a deposition, corroborated Allegretti in that he had had no knowledge of the extension agreement between cross-complainant and Allegretti on the $1,250 note. He testified further, that the first information he had that the note had not been paid by Allegretti, came from his brother, about four years after its maturity, when the cross-complainant demanded payment thereof and threatened suit; that Allegretti was in a position to pay this note at maturity, but that since then he had become a bankrupt.

Frederick M. Bowes, another witness on behalf of ~~the appellants~~ complainants, testified that he had no knowledge until June, 1911, that the note in question had not been paid; that prior thereto he had had no communication with cross-complainant, with reference to the unpaid note, nor had he any intimation that the time of payment thereof had been extended.

The cross-complainant, in his testimony, admitted that he had a conversation with Allegretti at the time the note in question matured, but denied having granted him an

extension of one year on the payment thereof. He also testified that when the note fell due, ~~appellants~~ cross-complainants requested him to extend the payment thereof. He further denied having received interest for the period for which ~~appellants~~ cross-complainants claim the note was extended, and denied all knowledge of the fact that ~~appellants~~ cross-complainants had no further interest in the business, or that one Connell had intended becoming interested therein.

The witness C. W. Greenfield, was attorney for Allegretti in most of his dealings with cross-complainant and ~~the appellants~~ cross-complainants, and his testimony was principally with reference to what transpired at these conferences. Regarding the agreement of May 15, 1908, wherein Allegretti agreed to hold ~~the appellants~~ cross-complainants harmless from any liability, he testified as follows: "Mr. Allegretti and Mr. Pike came to my office one day, and Mr. Allegretti said that Mr. Pike had come up with him to talk to me about the - well, as they expressed it, about getting the Bowes out of this business. * * * Mr. Pike said that he would like very much to see the Bowes out of that business; * * * that he would do all he could to aid Mr. Allegretti in making a success of the business, and that he would do absolutely nothing further unless the Bowes were out of the business." This is in direct contradiction of cross-complainant's testimony upon this point.

It further appears from the evidence, that on July 31, 1908 the cross-complainant entered into an agreement whereby the rent was to be reduced, commencing July 1, 1908, and continuing until June 30, 1910, provided one James Connell would invest not less than $10,000 cash in the company. The necessary cash was invested by Connell, and the rent was accordingly reduced. Conferences were had at this time, and as the note in question was about to

become due, necessarily the matter of its payment or extension must have been discussed and some arrangement made with reference thereto. It is significant that cross-complainant, from August 1, 1908, when the note in question matured, until just before August 1, 1909, did not make any demand for payment of this note. It is also a significant fact that cross-complainant never took up with the appellants the question of payment of this note until Allegretti had become insolvent in June, 1912. The testimony herein above set forth, viewed in the light of other facts and circumstances shown by the record in this case, which we deem it unnecessary to set forth here, leads this court to the conclusion that the chancellor's finding is manifestly against the preponderance of the evidence.

It clearly appearing from the evidence in this case, that the cross-complainant had knowledge of the agreement made by Allegretti to save appellants harmless from liability on said note, and that he (the cross-complainant) acquiesced therein, and it further appearing that said cross-complainant entered into a binding contract with Allegretti, extending the time of payment on said note, for one year, it follows as a matter of law, that the appellants were released from further liability. Crossman v. Mohlleben, 90 Ill. 537.

For the reasons hereinabove assigned, the decree of the Circuit Court of Cook County will be reversed and the cause remanded, with directions to enter a decree in conformity with the prayer of complainants' bill of complaint.

REVERSED AND REMANDED WITH DIRECTIONS.

402 - 21389

HARRIETTE A. INGRAHAM, HENRY V. FREEMAN and JOHN F. GILCHRIST, Executors and Trustees under the will of GRANVILLE S. INGRAHAM, deceased, Appellees,	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
vs.	
JOHN W. MARINER and LUCINDA W. MARINER, Executors of the Estate of EPHRAIM MARINER, deceased, and J. PLATT UNDERWOOD, Appellants.	

200 I.A. 53

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

The decree herein appealed from stated an account between the parties hereto, and made final disposition of the assets of their joint venture. As this case has been reviewed on several previous occasions, it is unnecessary to here reiterate the facts. They are sufficiently set forth in the following former opinions in the case: Ingraham v. Mariner, 194 Ill. 269; Mariner v. Ingraham, 127 Ill. App. 542; id. 127 Ill. App. 550; id. 230 Ill. 130; id. 255 Ill. 108.

It is contended by appellants, that under the contract of January 2, 1889, upon a sale of the property, interest on the $70,000 invested by Ingraham in the joint enterprise should be included only for the purpose of determining the profits accruing therefrom, but that in the event of a loss, this interest item should be excluded; that as the decree of the chancellor includes said interest item in determining the amount of the loss, it is erroneous in this respect.

The Lorenz Brunn decreased from sixteen on account because the positive interest, and more final disposition of the assets of their joint venture. In this case has been followed on several previous occasions, it is unnecessary to here reiterate the facts. They are sufficiently set forth in the following former opinions in the case: Lorenzen v. Grifner, 194 III. App. 500; Lorenzen v. Lorenzen, 197 Ill. 564; id. 197 Ill. App. 500; id. 204 Ill. App. 62, 204 Ill. 164.

It is contended by appellants, that under the decision of January 5, 1917, upon a sale of the property, instituted on the 17th day instituted by Lorenzen in the Joint arrangements should be finished only for the purpose of determining the profits accruing therefrom, but that in the event of a loss, this interest also should be realized; that on the issues of the Chancery tribunal will interest line in determining the amount of the loss, it is erroneous

The agreement of January 2, 1889 provides, in part as follows:

> "The said A. J. Cooper, of the 2nd part, being desirous of taking an interest in said land, agrees to make a loan of $30,000 (Thirty Thousand Dollars) at his own expense; also agrees to pay interest on said loan, and 6% on balance of Capital Stock to the said Granville A. Ingraham; the 6% on the balance is not required to be paid until the sale of said land; then that amount to be added to the Capital Stock.
>
> * * * * * * * * * * * * * * * * *
>
> "The said Ingraham of the 1st part agrees to give to said Cooper of the 2nd part, half of the profits, after adding all expenses and interest to the $1,000 (one thousand dollars) per acre of said land."

The aforesaid contention of appellants is based upon the language of the contract hereinabove quoted, viewed in the light of the foregoing decisions in the case.

Losses are the antithesis of profits, and both are determined in the same manner, unless otherwise provided by the contract. The language of the contract hereinabove quoted expressly provides that the interest item in question shall be included for the purpose of determining profits; therefore, in the absence of any special provision for the determination of losses, it must follow that this same basis of computation was intended to apply to the losses as well, should there be any. To hold otherwise would lead to confusion. For instance, let us assume that upon the basis of computation contained in the contract, a loss of $1000 would result. If the position of appellants were tenable, the interest item of approximately $82,000 would have to be eliminated. With this item excluded the transaction would show a profit of about $81,000. Clearly, such construction is illogical and gives rise to inconsistencies; and as we find nothing in the contract itself which would lend substance to the contention of the appellants on this point, the conclusion is inevitable that their position in untenable. It

The agreement of January 1, 1917 provides, in part as follows:

> "The said L. L. Cooper, of the 2nd part, being desirous of taking an interest in said land, agrees to make a loan of $40,000 (Forty Thousand Dollars) of his own expenses; also agrees to pay interest on said loan, and to be balance of Capital stock to the said Corporation. Provided; the said or the balance is not required to be paid until the sale of said land; then that amount to be added to the Capital stock.
>
> * * * * * * * * * * * * *
>
> "The said Corporation of the 1st part agrees to give to said Cooper of the 2nd part, half of the profits, after adding all expenses and interest to the $40,000 (one thousand dollars) per acre of said land."

The aforesaid instrument is quoted in full from the language of the contract hereinabove quoted, viewed in the light of the foregoing decisions in the case.

Herein are the ambiguities of profits, and land are determined in the same manner, unless otherwise provided by the contract. The language of the contract hereinabove quoted expressly provides that the interest also be deducted from the profits of the partner at stockholding profits; therefore, in the absence of any partial provision for the payment of the interest, it is clear that the land and land claim of the partnership (if such) is to be divided as well, absent [illegible] the [illegible] of the [illegible] purchase. The partners, if so minded, can make an accounting contained in the contract, a loss of $[illegible] would result. If the position of appellants were sustained, the interest loss of approximately $[illegible] would have to be allocated. Plus this loss would be the [illegible] some a profit of about $[illegible]. Clearly, such construction is illogical and gives rise to inconsistencies; and is so [illegible] in the contract itself which would land substance to the contention if the [illegible] on [illegible].

is maintained by appellants that when our Supreme Court passed upon this case in 194 Ill. supra and 230 Ill. supra, construing the contract, only profits were anticipated. But it expressly held in the 230th Ill. that in case of a loss, it should be borne pro rata, according to the amount contributed by each. The decree upon which the court in the 230th Ill. was passing, used the following language:

> "In case there should be no profits realized out of said enterprise, and in case there should not be sufficient to repay the capital, interest and expenditures aforesaid to the respective parties as herein announced, that each of the parties shall bear his pro rata share of losses incurred, according to the contribution made by each."

Nowhere has the Supreme Court indicated that in case of a loss the interest item in question should be excluded, although the foregoing language in the decree makes provision for the apportionment of losses, in the event there should be any. In the 255th Ill., our Supreme Court, after reaffirming its language in the 230th Ill., makes use of the following language, p. 111: "After the sale it was ascertained that there were no profits to be divided, but, instead, a loss of about $168,000." This amount ($168,000) includes the interest item in question, and while the foregoing language may be regarded as dictum, this precise question not having been before the court, nevertheless it indicates that the view of the Supreme Court at that time was that on the statement of an account between the parties the interest item should be included in determining the losses, and we do not feel warranted in holding contrary to this intimation especially as it is not inconsistent with anything the court has heretofore said in the case.

It is urged, by way of cross-error, that interest, from the date of sale, should have been allowed upon the principal amount of $48,971.09 found due from appellants to

is maintained by appellants that when our Supreme Court passed upon this case in 194 Ill. Supp. and 320 Ill. Supp., construing the contract, only profits were anticipated, but it expressly held in the 320th Ill. that in case of a loss, it should be borne pro rata, according to the amount contributed by each. The terms upon which the court in the 194th Ill. was guided, used the following language:

> "In such there should be no profits realized but at most subscribe, and in case there should not be sufficient to repay the capital, interest and expenses allowed to the respective partners on hands advanced, that each of the parties shall bear his pro rata share of loss so incurred, according to the contribution made by each."

Nowhere has the supreme Court indicated that in case of a loss the interest item in question should be omitted, although the foregoing language in the contract makes provision for the apportionment of losses, in the event there should be any. In the 320th Ill., our supreme Court, after reaffirming its language in the 194th Ill., makes use of the following language, p. 321: "Upon the face it was contemplated that there were no profits to be divided, but, instead, a loss of about 1[illegible]000." This account (1[illegible]000.00) includes the interest item in question, and while the foregoing language may be regarded as dicta, this precise question not having been before the court, nevertheless it indicates that the idea of "[illegible]" as to the item was that on the statement of an account between the parties the interest item should be included in determining the losses, and so do not feel warranted in holding contrary to this intimation especially as it is not inconsistent with anything the court has heretofore said in the case.

It is urged, by way of cross-error, that interest, from the date of suit, should have been allowed upon the principal amount of $48,372.78 found due from appellants in

appellees. The contention of appellees is predicated upon sec. 2 ch. 74, R. S., which provides that "creditors shall be allowed to receive at the rate of 5% per annum for all moneys after they become due on any bond, bill, promissory note or other instrument of writing." It will be seen that, in order to come within the foregoing provision of the statute, the relationship of debtor and creditor must exist. The $48, 971.09 found by the court to be due from appellants to appellees, was, in fact, due from appellants to the firm, and from the firm to appellees, but, to use the language in appellees' brief, "as the same amount was due from the partnership to the Ingraham estate, and as there were no partnership assets remaining after the sale of the land, the decree ordered appellants to pay this sum direct to the Ingraham estate." In Lindley on Partnership, 5th edition, it is said, p. 402: "If the assets are not sufficient to pay the debts and liabilities to non-partners, the partners must treat the difference as a loss and make it up by contributions inter se. If the assets are more than sufficient to pay the debts and liabilities of the partnership to non-partners, but are not sufficient to repay the partners their respective advances, the amount of unpaid advances ought, it is conceived, to be treated as a loss, to be met like other losses. In such a case the advances ought to be treated as a debt of the firm, but payable to one of the partners instead of to a stranger." Clearly, therefore, the amount which appellants were decreed to pay to appellees, was a firm obligation, and consequently the relationship of debtor and credit never existed between appellants and appellees. We are of the opinion that the chancellor properly refused to allow the statutory 5%.

Finding no reversible error, the decree of the Circuit Court of Cook County will be affirmed.

AFFIRMED.

appellees. The construction of appellees in predicating upon sec. 2 ch. 74, R. S., which provides that "mechanics shall be allowed to recover on the note of of one person for all memoys after they become due on the note, will, probably note or other instrument of writing." It will be seen that, in order to come within the foregoing provision of the statute, the relationship of debtor and creditor must exist. The §42, 371.00 found by the court to be due from appellees to appellees, was, in fact, due from appellants to the firm, and from the firm to appellees, but, to use the language in appellees' brief, "at the time appellant was the from the proceeds to the Ingraham estate, and he there was no particularly assets remaining after the sale of the land, the court erred appellants to pay this sum direct to the Ingraham estate." In laches on referencing, the citation, it is said, "If the assets are not sufficient to pay the debts and liabilities to preferences, the preferre must stand the difference as a loss and make it up by contributing from the. If the assets are more than sufficient to pay the debts and liabilities of the partnership to non-preferre, but are not sufficient (a case not referred that particular) the amount of unpaid preferences ought, it is conceived, to be treated as a loss, to be met like other losses. In such case the advanced ought to be treated as a kind of the firm, but payable to one of the partners instead of to a stranger." Sherr, Supra. The [illegible] to pay to appellees, and a firm obligation, and consequently the relationship of debtor and creditor never existed between appellants and appellees. We are of the opinion that the chancellor properly refused to allow the mechanic's lien.

Finding no reversible error, the decree of the circuit court of Cook County will be affirmed.

MR. JUSTICE McGOORTY DISSENTING.

I dissent from that part of the foregoing opinion which holds that under the contract in question, interest on the $70,000 (Ingraham's contribution to the venture) should be included in determining the losses thereof.

Under the decisions of the Supreme Court in this case, it is res judicata (1) that the contract imposed no personal liability upon Cooper to pay interest upon Ingraham's contribution to capital; (2) that the contract provided that before there should be any division of profits, Ingraham should receive out of the proceeds of the sale of the property, interest upon his contribution, such interest for that purpose to be regarded as additional capital; (3) that losses should be borne in proportion to contributions; and (4) that for the purpose of apportioning losses the contributions were $70,000 by Ingraham, and $30,000 by Cooper.

The Supreme Court in Ingraham v. Mariner, 194 Ill. 269, held that "If * * * the capital of the joint enterprise is to be deducted in order to reach a remainder which shall constitute profits, then the six percent interest on the $70,000.00 is to be deducted, as well as the principal sum of $70,000." In distributing the property of a dissolved partnership among partners, capital does not bear interest * * * in the absence of express agreement or a usage of the firm to allow it. 2 Bates Partnership, Sec. 781.

While the contract expressly provides that such interest shall be included for the purpose of determining profits, it contains no provision for the determination of losses, and to hold in the absence of such provision, as

does the majority opinion of this court, "that this same basis of computation was intended to apply to losses" appears illogical. The Supreme Court in the 194 Ill. 269, page 278, in denying appellee's contention that by the terms of the contract Cooper agreed to pay Ingraham the interest on the $70,000 from his own share of the profits, when the land was sold, apparently interpreted the contract, not as entitling Ingraham to interest absolutely, but only conditionally, viz, in case the land sold for enough to pay the same after paying the expenses incurred by the parties in conducting the enterprise. It therefore follows, in my opinion, that defendants cannot be required to pay out of their own funds the whole or any part of the interest upon the Ingraham contribution of $70,000. It seems evident that the sole purpose of inserting in the contract the provision for the payment of interest to Ingraham on his contribution to capital, and payment by Cooper on the $30,000 loan, was to secure to Ingraham a fair rate of interest upon the money he had actually invested in the enterprise before there should be any division of the proceeds of sale, as profits.

As I interpret the decisions of the Supreme Court in this case, it has been held that for the purpose of ascertainment and division of profits, Ingraham's capital should be computed at $70,000 <u>plus interest thereon</u>, and for the purpose of ascertaining and apportioning losses, at $70,000 <u>without interest</u>. I am, therefore, of opinion that the decree of the Circuit Court should be reversed and the cause remanded to that court with directions to state the account in accordance with the account stated by appellants in their third assignment of error.

Does the majority opinion of this court, which gives basis of compensation was intended to apply to income producing illegal. The opinion begins in the 1st. sub. page 478, in defying Congress's construction that by the terms of the contract, interest begins to pay immediately interest on the $70,000 from the date of the receipt, particularly the contract was not, particularly considering the contract not as entitling Ingersoll to interest absolutely, but only conditionally, yet, in case the time had for enough to pay the same after paying the expenses incurred by the parties in constructing the enterprise. It therefore follows, in my opinion, that defendants cannot be required to pay out of their own funds any money or any part of the interest upon the expenses particularly of [illegible]. It seems evident that the sole purpose of inserting in the contract the provision for the payment of interest to Ingersoll on his contribution to capital, was payment by Cooper on the $70,000 loan, was to secure to Ingersoll a fair rate of interest upon the money he had actually invested in the enterprise before there should be any distribution of the proceeds of sale, or profits.

As I interpret the decisions of the Supreme Court in this case, it has been held that for the purpose of determining and division of profits, Ingersoll's capital should be computed at $70,000 plus interest thereon, but for the purpose of apportioning the appreciating income, at $70,000 without interest. I am, therefore, of opinion that the decree of the Circuit Court should be reversed and the cause remanded to that court with directions to which the decree is conformed with the opinion of this court applicable in their future management of affairs.

405 -21392

J. E. McCOY, J. R. JOHNSTON and J. G. HOWELL, Appellees,	)	APPEAL FROM
vs.	)	MUNICIPAL COURT OF CHICAGO.
ACME AUTOMATIC PRINTING CO., (corp.), Appellant.	)	

200 I.A. 55

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is a motion, by appellees, to dismiss the appeal. An inspection of the record filed herein discloses the fact that at the time this appeal was taken, there was then pending before the trial court a motion to vacate the judgment from which this appeal was prosecuted. Hence, the judgment was not final, and the appeal was prematurely taken. Hosking v. So. Pacific Co., 243 Ill. 320.

APPEAL DISMISSED.

144 - 22092

THE PEOPLE OF THE
STATE OF ILLINOIS,
Defendant in Error,

vs.

MILTON M. GREEN,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

200 I.A. 59

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Plaintiff in error (defendant below), was found guilty of the offense of living in an open state of adultery and fornication with one Mary Williams, and was sentenced to pay a fine of $200 and costs. To reverse this judgment, this writ of error is prosecuted.

Defendant contends that the information upon which this prosecution is based is repugnant in that the defendant is charged therein with having committed the offense of adultery and fornication with one "Mary Doe whose name to this affiant is unknown." Obviously, the name "Mary Doe" was intended as purely fictional, and such being the case, the use thereof is not inconsistent with the words following it, "whose name to this affiant is unknown."

It is further maintained by defendant, that the informant knew the correct name of "Mary Doe" at the time he signed the information. From a careful examination of the record, we can not say that the informant was possessed of this information.

Defendant next contends that the verification of the information is fatally defective. The point raised by defendant is, that the words, "sworn to" are improper in an

affirmation, "affirmed to" being the correct form. This, however, is a matter of form only, and should have been raised specifically in the court below; it comes too late when raised here for the first time.

Nor was it necessary for the prosecution to prove the status of Mary Williams. The information charged the defendant and "Mary Doe" with living together in an open state of adultery and fornication. There was competent evidence to show that the defendant was, at the time the alleged offense was committed, a married man, that his wife was then living and had not been divorced from him. A witness testified that he was present when the marriage took place. With this evidence in the record, it was unnecessary to prove the status of Mary Williams. Lyman v. The People, 198 Ill. 544.

Defendant's wife was called as a witness by the prosecution, and, over objection by the defendant, was permitted to testify to the fact that the defendant was her husband. After the case had been closed, on motion of the prosecution, the court re-opened it to permit the introduction of testimony of the brother of defendant's wife, who testified that he was present when the marriage took place. It is in the sound discretion of the court to let in further evidence after a case has been closed. Under the circumstances, we can not say that the court abused its discretion by permitting this additional evidence to be introduced.

While the evidence of defendant's wife was incompetent against him in this proceeding, yet as this case was tried without a jury, and there being sufficient competent evidence in the record to prove the marriage, the error complained of was harmless.

Finally, it is contended that the evidence is insufficient to sustain the judgment. We have made a careful examination of the entire record, and after due consideration of all the evidence submitted and the inferences that reasonably flow therefrom, we are satisfied that the guilt of the defendant has been established beyond a reasonable doubt. As was well stated in Crane v. The People, 168 Ill. 395, p. 405:

> "Section 12 of the act relating to the crime charged provides that the 'offense of adultery shall be sufficiently proved by circumstances which raise the presumption of cohabitation and unlawful intimacy.' The statute recognizes the inherent difficulty of proving by direct evidence any single act of adultery. The proof of circumstances which raise the presumption of cohabitation and unlawful intimacy is therefore sufficient to prove adultery."

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

Finally, it is contended that the evidence is insufficient to sustain the judgment. We have made a careful examination of the entire record, and after the consideration of all the evidence submitted and the inferences that reasonably flow therefrom, we are satisfied that the guilt of the defendant has been established beyond a reasonable doubt. As was well stated in Green v. The People, 168 Ill. 328, p. 334:

> "Section 19 of the act relating to the crime charged provides that the factors of delinquency shall be sufficiently proved by circumstances which raise the presumption of delinquency and unlawful intent. The statute recognizes the inherent difficulty of proving by direct evidence any charge act of delinquency. The proof of circumstances which raise the presumption of delinquency and unlawful intent is therefore sufficient to prove delinquency."

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

332 - 21317.

200 I.A. 61

VALIDA DENSBY, Appellee, vs. HENRY F. UMBRICHT, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

STATEMENT OF THE CASE. This is an action in tort brought in behalf of Valida Densby, by next friend, against John Umbricht, Clara Ritter (sued by her maiden name, Clara Umbricht), Henry F. Umbricht and Chicago Bank & Office Fixture Co., a corporation, to recover damages for injuries sustained by being struck by an automobile, alleged to be owned, managed and operated by said defendants. Suit was subsequently dismissed as to the Chicago Bank & Office Fixture Co. and John Umbricht (the latter having died), and proceeded to trial as to Henry F. Umbricht and Clara Ritter. Henry F. Umbricht, in addition to the plea of the general issue, filed a special plea denying ownership and operation of the automobile in question. There was a trial by jury resulting in a verdict for plaintiff in the sum of $7250 against both defendants. A remittitur of $500 having been entered, defendants' motions for a new trial and in arrest of judgment were overruled and judgment entered on the verdict for $2750 against each defendant. From such judgment Henry F. Umbricht appealed.

Before entry of final judgment, it was suggested of record that appellee, since the commencement of suit, had arrived at legal age, and all pleadings were accordingly

we arrived at legal age, and all pleading were accordingly

amended by striking therefrom the words "Marshall O. Densby, her father and next friend", wherever the said words appear therein.

Appellees evidence tends to show that on July 18, 1912, the defendants, Clara Ritter and Henry F. Umbricht, together with Emil Umbricht, his brother, were riding in an automobile on Jackson Boulevard (in the city of Chicago), in an easterly direction; that when the automobile reached the west line of Wood street, it "swerved or zigzaged" in a northeasterly direction, passing over the curbstone and the parkway between the curbstone and sidewalk at the northeast corner of the intersection of said streets, and upon the sidewalk there, where appellee was walking, striking her with such force as to render her unconscious and to sustain injuries serious and permanent. The automobile continued in its onward course, crashing into the porch of an adjacent brick house, and stopping after the forward portion of said automobile had partially descended the basement steps thereof. There was a conflict of evidence as to the speed at which the car was driven at the time and place in question.

It is admitted that the front seat of the car was occupied by Clara Ritter and her two uncles, Henry F. Umbricht and Emil Umbricht. The evidence of appellee tended to show that these three persons were the only occupants thereof; that the defendant, Clara Ritter, was seated on the lap of one of the two men in question, and that she and the man on whose lap she was seated were jointly operating the car. None of appellee's witnesses, however, identified appellant as the man who was thus jointly engaged. Defendants' witnesses Bahnsen and Rohner, employees of appellant, testified that they occupied the rear seat of said automobile; that it was operated solely by Clara Ritter; that appellant

was seated on the lap of his brother, Emil Umbricht, and that at no time during the trip in question, did the parties on the front seat of the car change their respective positions. It was admitted by appellant, that he first operated an automobile six to eight years prior to the trial, which was had January 4th, 1915, that so far as he knew, his brother, Emil, never owned nor operated an automobile, and that the latter was a nonresident of Chicago.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

The principal question of fact presented by the evidence in this case is, - Did appellant operate, or participate in the operation, of the automobile in question?

There is no evidence of ownership in appellant. While appellee's evidence tends to show that appellant took part in the operation of the car in question, such evidence is uncertain in character and is not sufficient to establish a case as against the positive denial not only of appellant and his co-defendant, Clara Ritter, but also by that of Mahnsen and Rohner.

We are of the opinion, therefore, that the verdict as to appellant is manifestly against the weight of the evidence. The judgment of the Circuit Court as to Henry F. Umbricht, appellant, will be reversed, and the cause remanded.

REVERSED AND REMANDED.

352 - 21537

W. E. FISHER,
Appellee,

vs.

W. H. DUNN,
Appellant.

APPEAL FROM THE
SUPERIOR COURT OF
COOK COUNTY.

200 I.A. 63

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

W. E. Fisher (appellee here), doing business as W. E. Fisher & Co., brought suit in the Superior Court of Cook County against W. H. Dunn. There was a trial by jury and at the close of all the evidence the court directed the jury to find the issues for plaintiff and to assess his damages in the sum of $93.49, which was accordingly done, and judgment entered upon the verdict. From such judgment defendant appealed.

The claim upon which plaintiff sued defendant was for groceries and meats sold and delivered. Dunn, the defendant, purchased groceries and meats from F. F. Brown & Co., and subsequently from plaintiff, who succeeded F. F. Brown & Co. The evidence shows that defendant, at various times, made payment to plaintiff upon stated accounts. Checks evidencing such payments, drawn by defendant and made payable to plaintiff, are in evidence. The last stated account between the parties was for $93.49 rendered August 6, 1914. It is contended by defendant that he did not know he was dealing with plaintiff, but supposed he was dealing with F. F. Brown & Co. The only testimony in the case was that of plaintiff and defendant. The evidence shows that defendant made payments to plaintiff on accounts stated as

follows, - May 4, 1914 - $50. June 6, 1914 - $40. July 6, 1914 - $35. Defendant's contention as to want of knowledge that he was dealing with plaintiff is without merit. There was no conflict in the evidence pertinent to the issues and the court did not err in directing a verdict.

Defendant assigns as error the failure of the court in directing a verdict for plaintiff to give such peremptory instruction in writing. When a peremptory instruction is given to find for one of the parties it is the better practice to give a written instruction, but the failure to do so does not constitute reversible error.

JUDGMENT AFFIRMED.

375 - 21362.

1774

ROSS ATTLEY LUMBER CO., a corporation, Appellee, vs. COLUMBIA HARDWOOD LUMBER CO., a corporation, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

200 I.A. 65

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This suit was brought in the Circuit Court of Cook County by appellee to recover from appellant the contract price of two cars of lumber. With its declaration, plaintiff ~~(appellee)~~ filed its affidavit of claim showing $1419.93 due. The defendant ~~(appellant)~~ filed with its plea of the general issue thereto, an affidavit of merits alleging that said lumber was not up to grade, nor according to contract; that defendant has not accepted same and that plaintiff is indebted to defendant for freight and demurrage charges paid by defendant on said lumber in the sum of $238.92. There was a trial by jury resulting in a verdict in favor of plaintiff in the sum of $1399.52. From such verdict the plaintiff consented to a remittitur of $38.95, and, thereupon, motion for a new trial was overruled and judgment entered against defendant in the sum of $1360.57. From such judgment defendant appeals and assigns as error the giving of certain instructions.

The defendant in Chicago, ordered from plaintiff two carloads of quarter oak lumber, "flooded stock, but very well washed and cleaned." Said lumber was shortly thereafter shipped by plaintiff from Heth, Ark., to defendant's order,

Chicago. There is a conflict of evidence as to the condition of the lumber in question upon its arrival in Chicago. It was sold subject to the rules of inspection of the National Hardwood Association, but such rules do not appear in evidence. Upon its inspection by defendant, the latter refused to accept the lumber, and, subsequently, declined to permit a mutual inspection thereof, on the ground that a portion of said lumber was covered with mud, that it was not possible, therefore, to determine how badly it had been damaged by water, asked plaintiff to pay the freight and demurrage charges thereon and take it away. Defendant's secretary, A. M. Schoen, testified that he telephoned plaintiff before defendant removed the lumber from the cars, that it was not up to grade and not what defendant ordered; that plaintiff's representative upon the following day requested defendant to unload the lumber from the cars so as to save demurrage, which defendant did. No part of the lumber in question has been used by defendant and remains in its possession, subject to plaintiff's order.

There was evidence introduced by defendant tending to show that the value of said lumber when received, was $330 to $340 less than the contract price.

Defendant's order and plaintiff's acceptance thereof constitute the contract between the parties. There was no express warranty as to the quality of the lumber contracted for, but there was an implied warranty that defendant would get what he bargained for, viz., quarter oak lumber, flooded stock, but very well washed and cleaned. Babcock v. Trice, 18 Ill. 420; Chicago Packing and Provision Co. v. Tilton, 87 Ill. 547.

The contention of plaintiff's counsel that the

acts of the defendant constituted an acceptance by it of the lumber in question, is not supported by the evidence.

Defendant after inspecting the lumber in question and rejecting same, refused the request of plaintiff to have an inspection of such lumber made by the National Hardwood Ass'n. It is contended by plaintiff's counsel that such refusal of inspection, together with defendant's continued possession of the lumber, which possession was at plaintiff's request, was such exercise of ownership by defendant, as constituted an acceptance. "So long as the buyer can, without self contradiction, declare that the goods are not to be taken in fulfillment of the contract, he has not accepted them." Blackburn on Sales, page 17. The evidence does not show such acceptance by defendant as would constitute a discharge of plaintiff's liability under the contract. Underwood et al. v. Wolf, 131 Ill. 425 - 442. The acts of defendant, in any event, did not constitute such an acceptance as would waive the implied warranty as to quality. Babcock v. Trice, supra.

The first of plaintiff's instructions complained of told the jury, in effect, that if they believed from the evidence defendant accepted the lumber in question it would be liable under its contract, erroneously excluded the element of implied warranty arising from such contract. Morris v. Wibaux, 159 Ill. 627, 642.

The next instruction assigned as error proceeded upon the theory that if the lumber in question was not according to contract and the defendant accepted same, the implied warranty as to quality was thereby waived. "Even when the contract is executory, the claim for damages on account of a breach of the warranty will survive the accept-

ance of the property." Underwood et al. v. Wolf, supra. Such instruction is clearly erroneous.

The third instruction complained of, erroneously stated what would constitute a constructive acceptance by defendant, and invaded the province of the jury by assuming such acceptance.

For manifest and prejudicial error in giving the foregoing instructions, the judgment of the Circuit Court is reversed and the cause remanded.

REVERSED AND REMANDED.

183 - 22135

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

LEWIS E. RICE,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

200 I.A. 68

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This is a criminal proceeding by information charging Lewis Rice, the defendant, ~~(plaintiff in error)~~ on September 22, 1915, with being an inmate of a house of ill fame, at 609 S. Wabash Ave., in the City of Chicago. Trial by jury having been waived, the cause was submitted to the court resulting in adjudging defendant guilty and sentencing him to pay a fine of $200, and the costs of suit, taxed at $6.

The defendant on above date and for six years prior thereto was employed as clerk in the Queen Hotel, being the premises referred to and described in said information. It is contended by defendant, if he is guilty of any offense under the evidence in this case, that he is guilty of being a keeper and not an inmate of a house of ill fame or assignation, etc.

The principal question presented for our consideration therefore is, - Was defendant an "inmate" within the meaning of section 57-a-1, Chapter 38, of the Criminal Code? Said section is as follows:

"57-a-1. Whoever is an inmate of a house of ill-fame or assignation or place for the practice of fornication or prostitution or lewdness, or who shall solicit to prostitution in any street, alley, park or other place

Defendants in error,

vs.

LEWIS R. MIX,

Plaintiff in error.

This is a criminal proceeding by information charging Lewis Mix, the defendant, (plaintiff in error) on September 28, 1910, with being an inmate of a house of ill fame, in 200 [illegible] Second Ave., in the City of Minneapolis. Tried by jury having been waived, the cause was submitted to the court resulting in defendant being found guilty and sentencing him to pay a fine of $500, and the costs of suit, taxed at $6.

The evidence of [illegible] the [illegible] prior thereto was employed [illegible] in the house [illegible], being the premises referred to and described in said information. It is contended by defendant, if he be guilty of any offense under the evidence in this case, that he is guilty of being a keeper and not an inmate of a house of ill fame or assignation, etc.

The principal question presented for our consideration therefore is, - Has defendant an "inmate" within the meaning of section 4[illegible]-[illegible], Chapter 36, of the Criminal Code? said section is as follows:

"27-a-1. Whoever is an inmate of a house of ill-fame or assignation or plies for the priority of fornication or prostitution or lewdness, or who shall solicit or [illegible]

in any city, village or incorporated town in this State, shall be fined not exceeding two hundred dollars, or imprisoned in the county jail or house of correction for a period of not more than one (1) year, or both."

Section 57 so far as material is as follows:

"57. Whoever keeps or maintains a house of ill fame or place for the practice of prostitution or lewdness, or whoever patronizes the same, or lets any house, room or other premises for any such purpose, or shall keep a common, ill governed and disorderly house, to the encouragement of idleness, gaming, drinking, fornication or other misbehavior, shall be fined not exceeding $200. * * * "

The evidence tends to show that the hotel in question was a house of assignation under the Statute; that men and women came to said hotel for the purposes of assignation, and the circumstances were such that the defendant had knowledge of that fact, and that these circumstances in our opinion made defendant an "inmate" within the meaning of the statute, and the judgment of the Municipal Court is therefore affirmed.

AFFIRMED.

In any city, village or unincorporated town in this state, shall be fined not exceeding two hundred dollars, or imprisoned in the county jail or house of correction for a period of not more than six (6) months, or both.'

Section 57 is for an municipal is as follows:

"57. Shooter keeps or maintains a house of ill fame or place for the practice of prostitution or lewdness, or shooter permitting the same, in law any house, room or other premises for any such purpose, or shall keep common, ill persons and disorderly house, be the encouragement of idleness, gaming, drinking, tippling or other misdemeanor, shall be fined not exceeding $100. " " " "

The evidence tends to show that the Detect is

employed as a lover of adulterous mated the industry

that man and wives come to seek hotel for the purpose of

committing the adulterous acts and that the

information had knowledge of that fact, and that there

existed in the minds of the hotel officers or "Manager"

within the meaning of the statute, and the judgment of

the Municipal Court is therefore affirmed.

AFFIRMED.

302 - 22257.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	WRIT OF ERROR
vs.	TO MUNICIPAL COURT OF CHICAGO.
HANS NESS, Plaintiff in Error.	

200 I.A. 69

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

This is a criminal proceeding by information against defendant (plaintiff in error) charging him with obtaining from Eugene Sullivan, the informant, with intent to cheat and defraud, by means of false pretenses, the sum of $190. Trial by jury having been waived, the court found the defendant guilty in manner and form as charged in said information, and sentenced him to the House of Correction of the city of Chicago for three months, and further to pay to the Clerk of the Municipal Court of Chicago, a fine of $200 and costs of suit.

Ness, the defendant, entered into a contract with the said Sullivan whereby he agreed to do certain carpenter work on Sullivan's dwelling house, for a certain stipulated sum. Defendant at Sullivan's request performed other work on said house in addition to that specified in their contract, for which work defendant, as a result of compromise, accepted $190 in full settlement of all claims against Sullivan. On the day following, defendant executed and delivered to Sullivan a statutory waiver of lien as to said premises. Sullivan and his wife testified that said $190 was paid by Sullivan to defendant upon representation by the latter that all bills for labor and material furnished had been paid. Defendant testified that at the time of said

operated mechanics (plaintiff in error) charging him with obtaining from Eugene Sullivan, the informant, with intent to defraud and defraud, by means of false pretenses, the sum of $[illegible]. Trial at jury [illegible], the court [illegible] the defendant guilty in manner and form as charged in said information, and sentenced him to the house of correction of the city of Chicago for three months, and further to pay to the clerk of the municipal court of Chicago, a fine of $[illegible] and costs of suit.

Keen, the defendant, entered into a contract with the said Sullivan whereby he agreed to do certain carpenter work on Sullivan's dwelling house, for a certain stipulated sum. Difference at Sullivan's request [illegible] on said house in addition to that specified in the contract, for which work information, as a result of misrepresentations, accepted $[illegible] in full settlement of all claims against Sullivan. On the day following, defendant executed and delivered to Sullivan a statement, under oath, of lien on a main premises. Sullivan and his wife testified that such lien was paid by Sullivan to defendant upon representation by the latter that all bills for labor and material furnished had

settlement, he stated to Sullivan that there were unpaid bills in the sum of $400 for material used by defendant on said property. Defendant further testified that subsequent thereto, he offered to pay the Hines Lumber Company for lumber used by defendant on said property in monthly installments, which offer said company declined to accept. There is no evidence of any lien filed on informant's premises by any subcontractor, nor that informant has received any notice or claim for such lien, although the information herein was filed more than four months following the completion of said work by defendant. We do not think defendant's intent to cheat and defraud the informant has been established. In State v. Hurst, 11 W. Va. Reports, 54, 75, the court there held that a man cannot be held guilty of procuring money by false pretenses, with intent to defraud, who has merely collected a debt justly due him, though in making such collection he has used false pretenses. In the instant case, the informant by his settlement with defendant impliedly admitted he was justly indebted to the latter. The parties acted within their legal rights in making such settlement, subject to the rights of subcontractors. There is evidence tending to show that defendant, subsequent to the settlement in question, made payment to certain subcontractors, and tendered payment by installments to another. In this state of the record we are not convinced that the essential element of intent has been established. The judgment of the Municipal Court of Chicago is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 41

BE IT REMEMBERED, that afterwards, to-wit: on the 13th day of September, A. D. 1915, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5921.

Old Colony Life Insurance

Company, appellant.

vs Appeal from Kane.

Helen L. Graves, appellee.

Niehaus, J.

Bill by ~~This is a chancery proceeding commenced by appellant~~ Old Colony Life Insurance Company, complainant, against ~~the appellee~~ Helen L. Graves, defendant, ~~in the Circuit Court of Kane County,~~ to vacate and set aside a judgment recovered by ~~the appellee,~~ defendant against the Cosmopolitan Life Insurance Company Association ~~on June 1, 1909,~~ for the sum of $1605.25 and costs of suit; and to restrain the ~~appellee,~~ defendant, from prosecuting ~~the~~ a suit commenced by her, complainant ~~on or about May 6, 1910,~~ against the ~~appellant, in the Circuit court of Kane County,~~ to enforce payment of the judgment recovered against said Cosmopolitan Life Insurance Association. From a judgment for defendant, complainant appeals.

The bill of complaint as amended, alleged, that the Old Colony Life Insurance Company ~~is~~ was a corporation existing by virtue of the law of this state, as an old line reserve insurance company; and that the Cosmopolitan Life Insurance Association, on and prior to September 9, 1909, was a corporation existing under the laws of this state, and doing insurance business on the assessment plan; and that this Cosmopolitan association had prior to July 1st, 1901, been known by the name of the Knights of the Globe Mutual Benefit Association; that on September 9, 1909, the ~~appellant, Old Colony Life Insurance Company~~ complainant, entered into an agreement with the Cosmopolitan Life Insurance Association by which the Old Colony Company promised, in consideration of receiving all the assets of the Cosmopolitan Association, to assume all of the liabilities of the Cosmopolitan Association then existing, and which

Sen. Co. Ct.

Old Colony Ins. Insurance

Company, Appellant,

vs.

Appeal for Ben.

Elias G. Carter, Appellee.

Discussion, J.

[illegible]

Old Colony Life Insurance Company, [illegible]

G. Carter [illegible] Court, to which an [illegible] made a judgment recovered by the [illegible] against the Commonwealth Life Insurance Company Association on [illegible] for the sum of $1800.25 and costs of suit; and to reverse the [illegible] from proceeding [illegible] suit commenced by [illegible] to enforce payment of a judgment recovered against said Commonwealth Life Insurance Association.

The bill of complaint as amended, alleged, that the Old Colony Life Insurance Company is a corporation existing [illegible] the law of this state, as in old it a reserve insurance company; and that it a Commonwealth Life Insurance Association, on and prior to September 8, 1899, was a corporation existing under the laws of this state, and doing insurance business on the assessment plan; and that the Commonwealth association had prior to June 1st, 1899, [illegible] the Knights of the Golden Eagle Benevolent Association, [illegible] on September 8, 1899, the [illegible] Insurance Company, entered into an agreement with the Commonwealth Life Insurance Association by which the Old Colony Insurance Company, in consideration of furnishing to the [illegible] of the Commonwealth association, [illegible]

might exist, on and after the date of the agreement.

It ~~is~~ was further alleged ~~in the bill~~ that the ~~appellee~~ defendant recovered the judgment mentioned against the Cosmopolitan Life Insurance Association, for an amount claimed to be due her upon the certificate of membership issued to ~~appellee's~~ defendant's husband, Frank E. Graves, by the Knights of the Globe Mutual Benefit Association, the predecessor of said Cosmopolitan Association; that the cirduit court of Kane County was without jurisdiction to render said judgment against the Cosmopolitan Association, because that Association was never legally served with summons; the summons upon which said judgment is based, having been served upon one J. O. Myers, as agent of said Cosmopolitan Association; ~~and~~ that Myers was not an agent of said Association; and that the Cosmopolitan Association did not learn of the pendency of the suit, or the rendition of said judgment, until about September 9, 1909.

The bill also alleged that the ~~appellee~~ defendant had, prior to the commencement of her suit against the Cosmopolitan Association and prior to the recovery of her judgment, in consideration of the sum of $500. paid to her, legally released the Cosmo~~politan~~ politan Association, fromall claims and demands which she may have had by reason of said certificate of membership.

The bill also alleged that Frank E. Graces, the insured on the 25th.day of August 1907, forfeited his rights in the insurance certificate, for non payment of membership fees payable on that date; that, in order to become r instated in the Cosmopolitan Insurance Association, he had signed a reinstatement health certificate, in which he made a warranty that he was at that time in good health, and did not have any disease or serious illness; and had not taken medicine, or had any medical attention, nor had been treated by a physician, since

might exist, on any other ground than that of the agreement.

It has already been stated that the defendants recovered the judgment mentioned against the Commonwealth Life Insurance Association, for an amount similar to the last claim, on certificate of membership issued to Benjamin Franklin Graves, by the Knights of the Three Kings Mutual Benefit Association, the predecessor of said Commonwealth Association; and the circuit court of Knox County was thereupon instructed to render said judgment against the Commonwealth Association, the same having been duly entered, with the consent of the attorneys upon which said judgment is based, having been entered upon a C. Myers, as agent of said Commonwealth Association, that Myers was not an agent of said Association and that the Commonwealth Association is not bound by the judgment in the suit, or the revivation of said judgment, until about September 1, 1907.

The last claim (that on the Mutual Life, which is the concurrent of but with regard to the Commonwealth Association) and prior to the recovery of our judgment, in consideration of the sum of $[illegible], paid to one, Jeremiah Hassenpflug, Commonwealth Association, Mutual Life and Mutual Benefit Association, the one, Jere Hassenpflug, in behalf of said certificate.

The Mutual Life certificate, issued to Graves, the insured on the 25th day of August 1907, contained the clause in insurance certificates, for the purpose of conformity with payable on that date; that, in order to secure a transfer of the Commonwealth Insurance Association, the Commonwealth Association certificate, in order to be with a refund, be was at that time in good health, and that not such any related to medical illness, and that [illegible] medical examination, nor had a [illegible] in [illegible].

becoming a member of the Association; that these warranted representationsof said Frank F. Graves were untrue; that it was agreed in said reinstatement certificate, that in case they were untrue, the certificate of membership should be held null and void; and that the same was therefore void; and that, because of the matters alleged in the bill, the judgment recovered by ~~appellee is~~ defendant is unjust, inequitable and void.

The ~~appellee~~ defendant answered and filed a cross bill, praying for affirmative relief, and asking for a decree to compel the ~~appellant~~ complainant to pay the amount which she claimed was due her on the membership certificate, and on the judgment which she had recovered. ~~The circuit Court heard the evidence offered by the parties upon the issues presented by the bill and cross bill, and~~ The circuit court rendered a decree dismissing the original bill for want of equity, granting the prayer of the cross bill, and adjudging that ~~appellee~~ defendant recover against the ~~appellant~~ complainant the sum of $1950.25, and costs; and that, upon payment of said amount the judgment against the Cosmopolitan Life Insurance Association be adjudged satisfied.

~~The record discloses many controversies; and a number of contested questions of fact and law are raised on this appeal.~~

It appears ~~from the evidence,~~ that Frank F. Graves, the husband of ~~appellee~~ defendant, filed an application for membership in the Knights of the Globe Mutual Benefit Association, about May 22, 1895, at Elgin Illinois, and that a ~~xxxx xx~~ certificate of membership for the sum of $2000 insurance, for the benefit of his wife Helen L. Graves was issued to him on that date. The certificate contained the following provisions:

That the Knights of the Globe Mutual Benefit Association agrees to pay to the beneficiary, the sum of the insurance, "in consideration of * * * * the sum of $5.00 * * * * and of the payment of such other sums of money for assessment for

mortuary claims and expenses in said Association according to the By-Laws made and provided"; * * * * "that it is also understood, covenanted and agreed: (1) That the aforesaid insured shall be liable to assessments for mortuary claims according to the table of rates prescribed in the By-Laws of said Association; and for the dues for expenses as required by said By-Laws, upon due notice given in the manner prescribed by said By-Laws."

Also the following provisions:

"It is understood and agreed that the application of the insured to whom this certificate is issued, now on file in the office of this association and bearing even number herewith, together with this certificate and the By-Laws of this association, shall constitute the complete and only contract between the aforesaid insured and themselves."

The following is the provision contained in the certificate concerning the assessments to be paid, an the manner of paying them:

"And it is also understood, covenanted and agreed: (1) that the aforesaid insured shall be liable for assessments for mortuary claims according to the table of rates prescribed in the By-Laws of said association, and for the dues for expenses as required in said By-Laws, upon due notice given to him in the manner prescribed in said By-Laws."

On the back of the certificate, under the head of "Important instructions and information", appears the following, concerning notices, dues and assessments:

"Notice of dues and assessments due will be promptly mailed in time to reach all members on or before the tenth day of the month."

Also the following concerning advance payment by members:

mortuary claims and expenses in said Association according to the By-laws made and provided"; * * * "that it is also understood, covenanted and agreed: (1) That the aforesaid insured shall be liable to assessments for mortuary claims according to the table of rates prescribed in the By-laws of said Association, and for the dues for expenses as required by said By-laws, upon due notice given in the manner prescribed by said By-laws."

Also the following provisions:

"It is understood and agreed that the application of the insured in this certificate is issued, and in the on the office of the association, and certain rules governing, included with this certificate and the By-laws of this association, will govern the rights and liabilities of contract between the aforesaid insured and themselves."

The following is the provision contained in the certificate concerning the assessments to be paid, in the manner of paying them:

"And it is also understood, covenanted and agreed: (1) That the aforesaid insured shall be liable for assessments for mortuary claims according to the table of rates prescribed in the By-laws of said association, and for the dues for expenses as required in said By-laws, upon due notice given to him in the manner prescribed in said By-laws."

On the back of the certificate, under the heading of "Important Information and Instructions", concerning the payment of dues, fees and assessments:

"Notice of dues, fees and assessments will be given to the insured in time to reach his office before the date of the month on which they are due."

Also the following concerning advance payment by members:

"Members wishing to avoid the inconvenience of making small payments, or the danger of lapsing arising therefrom, may make advance deposits in any amount desired. Any unused portion of such advance payment or deposits, shall be payable with this certificate at its maturity, in addition thereto. Traveling members or others, who do not receive their mail regularly, will find the advance plan much safer andmore convenient." In reference to the amounts and number of assessments, which the members of the association were to pay, Section 8, Article 5 of the By-Laws of the Association, in force at the time of the issuance of the Graves Certificate, provides, that on a certificate of $2000, each member shall pay a small annual assessment into the general fund, to pay the expenses of the association, of $1; and Section 7 provides, that mortuary assessments shall be made upon all members to pay on the amount of funds, as often as required to pay losses according to the ~~xxxxx~~ table. The table referred to fixes the amount to be paid upon the Graves certificate at $1.00.

The provision in the by-laws, about the notice of assessment to be sent to members, ~~is~~ was as follows:
"A notice of an assessment delivered to a member, or left at the insured's residence or place of business, or mailed postpaid to his post office address as last furnished to the Secretary of this association by such member, shall be considered duly served."

In the year 1901, the name of the Knights of the Globe Mutual Benefit Association, was changed to Cosmopolitan Insurance Association. The latter association adopted a new set of by-laws in 1905, by which the directors made monthly assessments when necessary~~x~~, to be paid by members for the mortuary fund; it also raised the table of rates, and increased the assessment levied against certificates like the one held by Graves, from $1.00 to

"Members wishing to avoid the inconvenience of making small payments, or the danger of paying without information, may make advance deposits in any amount desired. Any unused portion of such advance payments or deposits, shall be credited with the membership at the authority, in addition thereto. Therefore, members or others, who do not receive their call regularly, will find the advance plan more convenient."

In reference to the amounts and number of assessments, which the members of the association were to pay, Section 3, Article 3 of the By-Laws of the Association, in force at the time of the issuance of the Curves Certificate, provided, that on a certificate of $2000, each member shall pay a yearly minimum assessment into the general fund, to pay the expenses of the association, of $1; and further provided, that multiple assessments should be made with members to pay on the basis of $1000, as often as required to pay losses according to the assessment table. The table referred to fixes the amount to be paid upon the Curves certificate at $1.50.

The provision in the by-laws, about the notice of assessment to be sent to members, is as follows:

"A notice of an assessment mailed to a member, or left at the last or usual place of business, or residence, or mailed post-paid to his post office address as last furnished to the secretary of the association, shall be a sufficient notice of such assessment."

To [illegible] the duties of the [illegible] secretary association, we refer to "Compulsory Insurance Association. The latter association adopted a new set of by-laws in 1908, by which the insurance was monthly assessable upon assessments, to be paid by members for the ordinary fund; it also raised the table of rates, and increased the assessment levied against certificates like the one held by Curves, from [illegible]

$1.70. The by-law with reference to notice to be given to members, of assessments, remained the same.

About eight years prior to his death, the insured, Frank E. Graves, in following his trade as a printer, moved away from Elgin, and took up a residence in different parts of the country; and thus took up a residence in St Louis, in the early part of the year 1907; andlater in the month of April, settled in Nashville, Tennessee. ~~It is evident, from the proof offered on the trial, that~~ The insured kept the association, of which he was a member, constantly informed of the changes of his residence; and upon his removal to Nashville, from St. Louis, in 1907, he sent a notice giving his address at Nashville, to the secretary of the Cosmopolitan Association. It had become a matter of custom, between him and the association, to send money for his assessments in sums of $5.00; and sometimes he sent $8.00 and $10.00; and sometimes these amounts were sent in advance of mortuary assessments made by the association. When the amount so remitted was used up, the secretary of the association would notify him to that effect, and he then would again remit money. This custom prevailed during practically the whole period of his membership. The amounts remitted by him were applied in payment of the assessments which had become due, and which thereafter became due. In this way, he sent the sum of ~~xxx~~ $5.00 about the 25th. of April, 1907, after his removal from St. Louis to Nashville; and the amount sent was applied by the Cosmopolitan Association, to pay assessments levied against his certificate. No notice to pay further assessment was received by himuntil about August 26, 1907, when he was notified by the secretary of the association that it claimed a balance of 60¢ due on the July assessment, and the full assessment made for the month of August. The secretary also sent him a so called health certificate, or reinstatement on account of a forfeiture

[illegible]. The by-law with reference to notice to be given to [illegible]ers, of meeting only, applied the same.

About eight years prior to his death, the insured, Frank E. Graves, in following his trade as a painter, moved away from Elgin, and took up a residence in different parts of the country; and thus took up a residence in St Louis, in the early part of the year 1907, and later in the month of April, settled in Meaville, Tennessee. In [illegible] the insured left the association, of which he was a member, constantly informed of the changes of his residence; and upon his removal to Meaville, from St. Louis, in 1907, he sent a notice giving his address at Meaville, to the secretary of the Commonwealth Association. It had become a matter of custom, between him and the association, to send money for his assessments in sums of $5.00; and so likewise he sent $5.00 and $10.00; and sometimes these amounts were sent in advance of monthly arrears made by the association. When the amount so remitted was used up, the secretary of the association would notify him to that effect, and he then would again remit money. This custom prevailed during practically the whole period of his membership. The amounts remitted by him were applied in payment of the assessments which had become due, and which thereafter became due. In this way, he sent the sum of $[illegible]. $5.00 about the 28th. of April, 1907, after his removal from St. Louis to Meaville; and the amount sent was applied by the Commonwealth Association, in the proper way, to the payment of certificates. No notice is ever further assessment the further by his death about August 20, 1907. Upon he was notified by the secretary of the association that it claimed a balance of $[illegible] due on the July assessment, and the full assessment made for a period of August. The secretary also sent him a so called [illegible]

of his membership. This health certificate he was directed to sign and return. Thereupon about September first, he remitted to the secretary the amount, which the Association figured covered the balance of the assessment claimed by the association to be due for July, and the assessment claimed by it for August and September. At the same time, he signed and returned the so called health certificate, changing it, however, by writing across the printed warranty concerning his health, the words: "Miscarriage of notice of assessment". The insured made remittances after that time, fully covering the amounts which were assessed against him, by the association, for the remaining months of the year 1907, and part of January 1908. He died on December 11, 1907; and proper proofs of death as required by the rules of the association , were made out and sent to the association.

About five weeks after the death of the insured, one Adam C. Schadel, who was a director of the association, called upon defendant, and obtained from her a release of her claim under the insurance certificate, by paying her $50. Afterwards on the 8th. day of December, 1908, the defendant commenced a suit in the circuit court of Kane County against the Cosmopolitan Life Insurance Association, to recover the balance she claimed to be due her on her $3000 certificate. Summons was issued in this suit and served on J. O. Myers, December 10, 1908 as agent of the defendant association; the president of the defendant association not being found in the county. The service was made by leaving a copy of the summons with Myers, which copy he mailed, postage prepaid, in an envelope having a return card on it to the address of the secretary of the association, W. W. Krappe Freeport, Illinois.

A notice of the suit which had also been commenced, was

of his membership. This health certificate he was directed to sign and return. Thereupon about September first, he remitted to the secretary the amount, which the Association figured covered the balance of the assessment claimed by the association to be due for July, and the assessment claimed by it for August and September. At the same time, he signed and returned the so called health certificate, changing it, however, by striking across the printed statement [illegible], the words: "Discontinue of notice of assessment". The insured made remittances after that time, fully covering the amounts which were assessed against him, by the association, for the remaining months of the year 1907, and part of January 1908. He died on December 12, 1907; and proper proofs of death as required by the rules of the association, were made out and sent to the association.

About five weeks after the death of the insured, one Wm. E. Bushell, who was a director of the association, called upon [illegible] obtained [illegible] and assistance from her a release of her claim under the insurance contract, by paying her $[illegible]. Thereupon on the 8th day of December, 1908, the appellee commenced a suit in the circuit court of this County against the Cosmopolitan Life Insurance Association, to recover the benefits she claims to be due on her $2000 certificate. Summons was issued in this suit and served on J. O. Ayers, December 10, 1908 as agent of the defendant association; the president of the defendant association not being found in the county. The service was made by leaving a copy of the summons with Ayers, with copy on ruling, was made pursuant, in an envelope addressed to it to the address of the secretary of the association, E. T. Smith, Freeport, Illinois.

[illegible]

also sent, in the regular course of mails, by ~~appellee's~~ defendant's attorney in a letter, postage prepaid to the address of the Association at Freeport, Illinois, on December 9, 1908.

No steps were taken by the association, to defend against the claim of the ~~appellee,~~ defendant and on June 1, 1909, a judgment was rendered by default, against the association, in favor of the ~~appellee~~ defendant, for $1605.25 and costs of suit; and this judgment ~~is~~ was the one sought to be vacated by ~~appellant.~~ complainant.

It also appears ~~from the evidence~~, that on the 9th. day of September, the ~~appellant~~ complainant entered into a contract with the Cosmopolitan Life Insurance Association, whereby in consideration of the transfer to it, of all the assets of the Cosmopolitan Association, it agreed to assume all the liabilities of the association for death claims then existing, or that might thereafter exist. On the basis of this contract, the ~~appellee~~ defendant, on May 6, 1910, commenced the suit referred to in the bill of complaint against the ~~appellant~~ complainant, to enforce payment of her judgment; and the prosecution of the latter suit the ~~appellant~~ complainant also ~~seeks~~ sought to enjoin in this proceeding.

In support of the claim for the relief sought by the bill of complaint, appellant contends that there was a forfeiture of the insurance certificate held by the insured, on account of the failure, by the insured, to pay the assessments due for July and August 1907; and that the insured, by signing the reinstatement and helath certificate, dated September 1st. ~~xxxxx~~ acknowledged that these assessments were due; and that he had failed to pay them; that he thereby also acknowledged that there was a forfeiture of his certificate; that in the reinstatement certificate, the insured made certain warranties concerning the condition of his health, which were untrue; and that it was expressly agreed in said ~~xxxxx~~ health certificate

that if those warranties were found to be untrue, the membership certificate should be thereby avoided; and that these warranties were untrue, and hence the certificate was avoided. It is furthermore urged by appellant, that after the death of the insured the appellee, in consideration of the payment to her of $500 released the Cosmopolitan Association from all further ~~xxxxxxxxxx~~ liability under the insurance certificate in question.

Appellant also claims, that the judgment which was obtained by the appellee, against the Cosmopolitan Life Insurance Association, was invalid because J. O. Myers, the person upon whom the summons was served as agent of the association, was not in fact, its agent, and that therefore, the court did not have jurisdiction of the association, as a party defendant in the suit.

We will first consider the question of the forfeiture of the insurance certificate. It is clear that the right ~~xxx~~ claimed to forfeit the certificate, was on account of the insured's failure to pay assessments to the association, and that those assessments were based on the advanced rates fixed by the association, under its new by-laws. As a matter of legal right, the association could not enforce those advanced rates against the insured; the only rate for which he was liable was the rate fixed by his insurance contract; and this insurance contract was embraced within the terms of his application for membership, his membership certificate, and the By-Laws of the Knights of the Globe Mutual Benefit Association as they existed at the time of his becoming a member. By this contract his assessment was fixed at the rate of $1. per assessment; and he was not obliged to pay the higher rate of $1.70 per assessment, which was fixed subsequently, by the new by-laws . (Peterson v Gibson

191 Ill. 365; Covenant Mutual Life Assn of Ill v Kentner, 148 Ill 431.) Furthermore it does not appear that the notice of assessments, which is provided for by Section 4 of Article 5 of the By-Laws of the Knights of the Globe Mutual Benefit Association, was mailed to his post office address; and this was required, before a forfeiture could be declared and made legally effective.

It is clear, that the right to declare a forfeiture, was dependent on the giving of the notice, as well as the failure of the insured to pay the assessment which he was obliged to pay. (M. W. Traveling Men's Ass'n. v Schultz, 148 Ill. 304.) Forfeitures are not favored in law.

"Before the defense of forfeiture because of non-payment of assessments can prevail, it must not only appear that every step necessary to constitute a legal assessment has been taken, but also that the member alleged to be in default has been notified in the precise manner specified by the rules and regulations of the order." (Farmers' Fed. v Croney 106 Ill. App. 425.)

If the $5.00 sent by the insured about the 25th. of April 1907 paid the raised assessment, within 60 cents, to and including the month of July, then according to the rate which the insured was obliged to pay, the amount sent was sufficient to pay his legal assessment, not only in full for July, but also for August; and hence his assessment for July and August, as a matter of equitable right, must be considered as paid. No right of forfeiture therefore existed; and it is obvious that if there was no right of ~~xxxxxxxx~~ forfeiture on account of non payment of assessments, none could be legally enforced. Nor was the insured estopped to deny the forfeiture because he had signed the reinstatement health certificate. (Cov. Mut. Life Ass'n v Tuttle, 87 App. 309.) If the Cosmopolitan Association had no legal right to enforce a forfeiture of the insured's membership in the Association, then it follows, that he did not lose such

[illegible] 3&B; Government Mutual Life Assn of Ill v Kenyon, [illegible] 432.) Furthermore it does not appear that the notice of assessment is required for by section 4 of Article 5 of the By-laws of the Knights of the Royal Benefit Association, was mailed to his last office address; in this was [illegible] before [illegible]

It is clear, that the right to [illegible] forfeiture, [illegible] depended on the giving of the notice, [illegible] as the failure of the insured to pay the assessment, which he was obliged to pay. (M. v. Traveling Men's Ass'n, v Bonnin, 146 Ill. 374.) Forfeitures are not favored in law.

"Not to the letters of forfeiture because of non-payment of assessments can prevail, it must not only appear that every [illegible] necessary to constitute a legal assessment has been [illegible], but also that the member alleged to be in default has been notified in the precise manner prescribed by the rules and regulations of the order." (Farmers' Tel. v Cooney 108 Ill. App. 482.)

If the $5.00 sent by the insured about the 28th, or April 1827 paid the raised assessment, within 30 days, to the treasurer the month of July, then according to the rule which was in force he failed to pay, the amount sent was sufficient to pay his level assessment, not only in full for July, but also for August and hence the assessment for July and August, as a matter of equitable right, must be considered as paid. No right of forfeiture therefore existed; and it is obvious that there was no right of [illegible] forfeiture on account of non-payment of assessments, nor could it have been enforced. [illegible] according to [illegible] [illegible] 87 App. [illegible]) [illegible] right to notice a forfeiture of the insured' [illegible]

membership; and that the Association had no right to exact a certificate to reinstatement, or require the insured to sign a reinstatement certificate; and the signing of the certificate by the insured, had no legal effect whatever upon the status of his membership.

Moreover it appears clearly, from the certificate itself that the insured did not intend to make, and as a matter of fact did not make the warranties concerning his health, which it is claimed that he made in the certificate. By writing across the printed words xxxxxxxxx containing the warranties mentioned, the words "miscarriage of notice of assessment" he clearly indicated an intention to avoid making any statement concerning the warranties; and that he expected his reinstatement to be based upon the supposed miscarriage of a notice to him, of the assessment. We are therefore of opinion, that there was no legal forfeiture of the membership of the insured; nor of his certificate of insurance.

Upon the question of the validity of the release, it is evident that the circumstances under which this release was obtained, and the means employed in obtaining it, as shown by the evidence, rendered it invalid. When the director of the Association, who journeyed to Tennessee for the purpose of obtaining this release came to the ~~appellee~~ defendant, she was in a distressed and nervous condition bordering upon mental and physical collapse. She was still suffering from the effects of a physical affliction, which had befallen her; was greatly depressed on account of the death of her husband, and worried because of the illness of her son, and the illness of her mother, whom she was nursing, and who was under her immediate care. ~~The evidence shows that she was so~~ weakened and nervous as to be incapable of xx the normal exercise of her will power; and, incapable, on account of her condition to transact business of importance. ~~It was upon this week, forlorn~~

[illegible]bersonally; and that the Association had no right to exact a certificate to reinstatement, or require the insured to sign a reinstatement certificate; and the signing of the certificate by the insured, had no legal effect whatever upon the status of his membership.

Moreover it appears clearly, from the certificate itself that the insured did not intend to mislead, and as a matter of law did not make the statements concerning his health, which it is alleged that he made in the certificate. By underlining across the printed form [illegible] containing the warranties mentioned, the words "misstatements of notice of assessment" are clearly indicative of intention to avoid making any statement concerning the warranties; and that he signed the reinstatement so as based upon his supposed misstatements of a notice to him, of the assessment. We are therefore of opinion, that there was no intentional misrepresentation of the insured, nor of his certificate of insurance.

Upon the question of the validity of the release, it is evident that the circumstances under which this release was obtained, and the [illegible] employed in obtaining it, as shown by the evidence, rendered it invalid. The director of the Association, who journeyed to Tennessee for the purpose of obtaining this release, [illegible] to the [illegible], she was in a distressed and nervous condition [illegible] upon mental and physical collapse. She was still [illegible] from the effects of a mental affliction, which [illegible] her husband, and [illegible] of the illness of her son, and the illness of her mother, when she was [illegible] under her immediate care. [illegible] above [illegible] weakened and nervous as to be incapable of [illegible] of her will power; and, therefore, on account [illegible] of illness

and incapacitated woman, that the valiant director of the Cosmopolitan Insurance Association concentrated his unimpaired power of intellect and argument; and he set out to convince her that the Association was really doing an act of benevolence in paying her $500 instead of the $2000 which was due her. She says he told her that she had no legal claim against the Association, and could not collect anything; that she could not afford to go to law, because if she went to law, the case would be tried in Illinois, and would take perhaps six years to dispose of it; that her husband had committed perjury, in swearing to a health certificate; and, if she brought suit, her husband would be branded as a perjurer; and she, as a perjurer's wife; that she could not afford to have a law suit which would disgrace her children, and her husband; and if she did not take the $500 offered to her, she would get nothing. He admits that he told her in the negotiations for the settlement, that her husband had sworn to something that was false, in the health certificate; and that it would be better for her to make this settlement; and that, in her weakened and enervated condition of body and mind, which he was fully aware of, he talked to her for an hour and a half to induce her to make the settlement. And there is no doubt, that she was induced to sign the release because he impressed upon her the belief, that he was acting in her interest; and by playing upon her fears, in making representations which were false. A release from liability, obtained under these circumstances, cannot be sustained in equity.

It is not necessary to discuss at length the other point raised by appellant; namely, that Myers, the person upon process was served as agent of the Association, was not legally the agent. The proof shows, that Myers attended to a number of matters for the Association that persons who are agents usually attent to,

[illegible] uncontaminated woman, that the [illegible] to-date [illegible] Population Inductance Association [illegible] be a [illegible] of [illegible] and argument; and he set out to convince her that the association was [illegible] her $500 instead of the $2000 which was due her. She [illegible] said her that she had no legal claim against the association, she could not collect anything; that she could not attend to it in law, because if she went to law, the case would be taken [illegible] Ultimate, and would take [illegible] years to dispose of it; that her husband had committed perjury, in swearing to a health certificate; and, if she brought suit, her husband would be treated as a perjurer; and she, as a perjurer's wife; that she would not afford to have a law suit which would die from old age, and her husband; and if she did not take the $ [illegible] to her, she would get nothing. He dared [illegible] be [illegible] her in the negotiations for the settlement; then he [illegible] to something that was false, in the health certificate; and that it would be better for her to make this settlement; for the [illegible] in her weakened and enervated condition of body or mind, which he was truly aware of, he talked to her for an hour and a half to induce her to make the settlement. And, there is no doubt, that she was induced to sign the release [illegible] from her the letter; and he was acting in her interest; and by coaxing [illegible] false, [illegible] attaches, cannot be [illegible] it [illegible].

It is not necessary [illegible] issues as law [illegible] failed to substantiate himself, that there, the reason [illegible] was served as a [illegible] of the association, was [illegible] the proof shows, that Mrs [illegible] [illegible] the association [illegible]

such as takkng applications for membership, collecting dues, and remitting them to the Association; also preparing proofs of death, and taking charge of them for the Association; and receiving the drafts in return, from the Association, to pay for death claims, for delivery to the beneficiaries; he also took releases of such claims for the Association. He undoubtedly stood in the position of an agent of the Association; and would be generally regarded as such; certainly outside parties, and the public generally, would be justified in so regarding him.

In Crowley, Cook & Co. v Sumner, 97 Ill. App. 304, the court says, in passing upon the question of agency in connection with service of process:

"The language of the statute is broad * * * * * it should receive a liberal construction to effect what was clearly the intention of the legislature to secure. Corporations doing business over wide areas of territory, are practically beyond the jurisdiction of local courts in such territory where the business is done, unless they can be reached by service upon their representatives there found. That a representative for limited purposes may be an agent for purposes of service under the statute, is plainly seen from the fact that not only a general agent may be served but also any agent may be served."

It is apparent that Myers, at the time of the service of the summons, seemed to regard himself as an agent; he made no objection to the service on the ground that he was not an agent; and did what any agent would do, after he was served -- transmitted the copy of the summons to the proper officer of the Association. And the Association seems to have regarded the service of the summons upon Myers, as agent, as proper; for it never questioned such service. The Association undoubtedly not only had notice of the service, but of the commencement of the suit. There is

in the record, which can rebut the presumption that the Association received the copy of the summons, which was mailed by Myers to its secretary, in due course of mails. Nor is there anything to contradict the assumption, that the Association received the notice of the commencement of the suit contained in the letter which was mailed by appellee's attorney, postage prepaid, about the time of the service of the summons. If the Association thought it had the right to question the legality of the service of the summons, it had ample time and opportunity, between December 19 1908, and the first day of June 1909, to do so. Not having availed itself of its opportunity, in the court where the suit was pending, the Association clearly was guilty of laches; and laches is a bar to relief, in a court of equity. (Allen v Smith 73 Ill. 331; Blackburn v Bell, 91 Ill. 434; Higgins v Bullock 73 Ill. 206; Walker v Kretzinger, 48 Ill. 502.) Furthermore, a court of equity will not lend its aid, to set aside a judgment at law, for want of proper service of process, unless it appears that there is a meritorious defense to the judgment; or to the claim upon which the judgment is founded. This doctrine is well settled, and was upheld b this court, in the case of Cadillac Automobile Company v Boynton, 142 Ill. App. 381; and the decision in that case was afterward affirmed by the supreme court in 240 Ill. 391.

It is apparent from the record, that there is no meritorious defense to appellees claim, or to the judgment which appellant seeks to vacate and annul. It was entirely proper for appellee to file her cross bill, and ask for affirmative relief in this proceeding, because such relief pertains to, and is a part of, the subject matter of this suit. Where a court of equity has jurisdiction of the parties, and the subject matter of the litigation, it has authority for the purpose of

in the record, which can reflect the presumption that the Association received the copy of the summons, which was mailed by [illegible] in the course of mails. Nor is there anything to warrant the assumption, that the Association received the notice of the commencement of the suit contained in the letter which was mailed by appellee's attorney, prior to the time of the service of the summons. If the Association thought it had the right to question the validity of the service of the summons, it had ample time and opportunity, from the [illegible] 18 [illegible], and the first day of June 1909, so to do. Not having availed itself of its opportunity, in the court where the suit was pending, the Association cannot now question of [illegible] and [illegible] is [illegible] to relief, in a court of equity. (Allen v Smith 72 Ill. 331; Mme Blackburn v Bell, 91 Ill. 497; [illegible] v [illegible] 73 Ill. 306; Walker v Wetzinger, 85 Ill. 502.) Furthermore, a court of equity will not lend its aid, to set aside a judgment at law, for want of proper service of process, unless it appears that there is a meritorious defense to the judgment, or to the claim upon which the judgment is founded. This [illegible] is well settled, and was upheld in this court, in the case of Chicago Automobile Company v Morrison, 149 Ill. 429, 38; [illegible] in that case was affirmed by the supreme court in 180 Ill. 444.

It is apparent from the record, that there is no meritorious defense to appellees claim, or to the judgment which appellant seeks to vacate and annul. It was entirely proper for appellee to file her cross bill, and ask for affirmative relief in this proceeding, because such relief pertains to, and is part of, the subject matter of the suit. Where a court of equity has jurisdiction of the parties, and the subject matter, at the initiation, it has authority for the purpose of

administering equitable relief, to adjudicate all the rights of the parties which are involved in the litigation. (Coleman v Connolly, 242 Ill. 583.) The court did not err in decreeing the relief prayed for by appellee in her cross bill. Appellees claim and judgment was one of the liabilities which appellant had assumed under its contract with the Cosmopolitan Association. It was, therefore, proper, in as much as the claim and judgment were valid, and a subsisting obligation against the Cosmopolitan Asso ciation, and under the terms of appellant's contract it should be required to pay the same.

We find no error in the decree, and it should be affirmed.

Decree affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

Where a benefit insurance certificate provided that the insured should be liable for assessments for mortuary claims according to the table of rates prescribed in the by-laws of the association, and that the insured's application then on file in the office of the association, said certificate, and the by-laws of the association shall constitute and only contract between the insured and said association, and such association thereafter changed its name and adopted new by-laws increasing its rate of assessment, held that the only rate for which the insured under such certificate was liable was the rate fixed by his insurance contract as embraced within the terms of his application for membership, his membership certificate, and the by-laws of the association as they existed at the time of his becoming a member, and he was not obliged to pay the higher rate fixed subsequently by the new by-laws, and such certificate was not liable to forfeiture for the insured's failure to pay such higher rate.

Forfeitures are not favored in law, and where the by-laws of a benefit insurance association provided that assessments for mortuary claims should be upon notice mailed to the postoffice address of the insured, held that the right to declare a forfeiture of a certificate issued by such association was dependent on the giving of the notice as well as the failure of the insured to pay the assessment which he was obliged to pay.

Where a benefit insurance association has no right to declare a forfeiture of an insurance certificate, such association may not exact a reinstatement health certificate from the insured, and such insured is not estopped by having signed such health certificate from denying the forfeiture of his insurance certificate, nor has such health certificate any legal effect whatever upon the status of his membership.

The words "miscarriage of notice of assessment" written by the insured under a benefit insurance certificate across the printed words containing warranties as to health in a health certificate sent to and signed by him for the purpose of reinstatement under the supposition that he was in default for nonpayment of an assessment, clearly indicate his intention to avoid making any statement concerning such warranties, and that he expected his reinstatement to be based upon the supposed miscarriage of a notice to him of the assessment.

A release of liability of an insurance association signed by the beneficiary under a benefit certificate issued by such association cannot be sustained in equity where such release was procured from such beneficiary through misrepresentations by a director of such association while such beneficiary was so laboring under physical and mental distress as to be incapable of normal exercise of her will power and of transacting business of importance.

Where service of summons in a suit against an insurance corporation was made, the president of such corporation being without the county, by leaving a copy of such summons with a person within the county who had been attending to matters of such corporation as agents usually attend to, and who received such copy of summons without objection and transmitted same to the proper officer of such corporation nearly six months prior to judgment on default in such suit, and no question was raised in the court where such suit was pending by such corporation as to such service, held that such corporation was guilty of such laches as bars it in equity from relief against such judgment in the absence of a meritorious defense.

A court of equity will not lend its aid to set aside a judgment at law for want of proper service of process unless it appears that there is a meritorious defense to the judgment or to the claim upon which the judgment is founded.

Where suit is brought by one insurance company to vacate a judgment recovered against another insurance company whose assets were acquired and liabilities assumed; by contract between the two companies, by such former company, and to restrain a suit brought against such former company to enforce such judgment, it is proper for defendant to file cross bill and ask and receive affirmative relief against such former company under such judgment and contract.

6028

1180

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 96

R H Dun Feb 1. 1916

BE IT REMEMBERED, that afterwards, to-wit: on DEC 27 1915 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6076.

Julia Jacobson, appellant.

vs Appeal from LaSalle.

Joseph M. Ramey, appellee.

Dibell, P. J.

Joseph M. Ramey owned a building in the city of Streator that had a stairway on the outside of the building. Mrs. Julia Jacobson was on said stairway when a board thereof gave way under her and she fell through to the ground and was seriously injured. She brought this suit against Ramey, to recover damages therefor. She filed a declaration containing three counts. Defendant did not demur thereto, but filed a plea of not guilty. There was a jury trial, and evidence for the plaintiff was heard. Plaintiff offered in evidence a lease of said building from Ramey to her husband, Samuel Jacobson. Defendant objected and the court reserved its ruling. At the close of the plaintiff's evidence the court sustained the objection to said lease. Thereupon plaintiff by leave of court filed an additional count. The accident was on October 31, 1912, and the additional count was filed January 22, 1915. No demurrer was interposed thereto but defendant filed a plea of not guilty and a plea of the Statute of Limitations. Plaintiff demurred to the plea of the Statute of Limitations and that demurrer was overruled, and plaintiff abided by her declaration. The plaintiff again offered the lease in evidence and the court sustained an objection thereto, and granted a motion by defendant to exclude all plaintiff's evidence and instructed the jury to return a verdict for defendant, and this was done. Motions for a new trial and in arrest of judgment were denied, and defendant had judgment in bar, and plaintiff below appeals therefrom. Appellee argues that the original declaration did not state a cause of action, and that if any cause of action for plaintiff has ever been stated, it is in the amended declaration, filed more than two

years after the injury, and that the statute of limitations bars the action.]

A plaintiff may amend his declaration or file an additional count stating his cause of action in a different way after the Statute of Limitations has run, without subjecting his action to the bar of the statute, as held in Swift & Co v Foster, 163 Ill. 50, and in many other cases. If the cause of action set up by an amendment to the declaration or by an additional count is a new one and not a mere re-statement of the cause of action set out in the original declaration, such amendment or additional count will not relate back to the commencement of the suit; and if the Statute of Limitations has run before said new cause of action has been stated, the plea of the statute will be a defense to said new cause of action. Eylenfeldt v Illinois Steel Co. 165 Ill. 185; Mackey v Northern Milling Co. 210 Ill. 115; McAndrews v C. L. S. & E. Ry. Co. 232 Ill. 232. This rule is re-stated, upon the basis of the foregoing and other authorities, in Bahr v National Safe and Deposit Co. 234 Ill. 101. One of the three essential elements of a cause of action which the plaintiff must aver and prove in such a cause as the one now before us, in order to entitle him to recover, is the existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains. But an allegation in such a declaration that it is the duty of the defendant to do or to refrain from doing certain things is only the averment of a legal conclusion and is an insufficient pleading. The declaration must state facts from which the law will raise that duty. This is fully stated in McAndrews v C. L. S. & E. Ry. Co. supra. and in many other cases.

There is a class of cases where a supposed defect in a declaration has been presented to the court after verdict.

[illegible] after the injury, and that the bounds of limitations [illegible] action.]

A plaintiff may assume his designation of fact as [illegible] court stating his cause of action in a different way from the Statute of Limitations has run, without subjecting his action to the [illegible] of the statute, as [illegible] in Duff v. Foster, 1Ch 171. But, and in any other cases. If the cause of action set up by an amendment to the declaration or by additional count is a new one and not a mere re-statement of the cause of action set out in the original declaration, such amendment or additional count will not relate back to the commencement of the suit; and if the Statute of Limitations has run before all the facts of [illegible] have been stated, the plea of the statute will be a defence to said new count or claim. Bilsbrough v Metropolitan Co. 1R 1Q. 1[illegible]; Hutchinson Milling Co. 21Q 1Ch. 1[illegible]; Hawthorne v R. L. & A. R. Co. 22Q 1Ch. 2[illegible]. This rule is re-stated, upon the basis of the foregoing and other authorities, in Hart v National Bank and Deposit Co. 7Ch 1Ch. 1Q1. One of the three essential elements of a cause of action which the plaintiff must have and prove in such a cause as the one now before us, in order to entitle him to recover, is the existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains. But an allegation in such a declaration that it is the duty of the defendant to do or to refrain from doing certain things is only the statement of a legal conclusion and is an insufficient pleading. The declaration must state facts from which the law will raise such duty. This is fully stated in Jacobsons v C. L. & C. R. R. Co. 1[illegible] 1[illegible] 1[illegible] case.

Order to [illegible]

The general principle is, "where there is any ~~xxxxx~~ defect, imperfection or omission, in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer; yet, if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively ~~xxxxxx~~ or imperfectly stated or omitted , and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is cured by the verdict." 1 Chitty's Pleading, 673; Keegan v Kinnare, 123 Ill. 280. In Western Stone Co. v Whalen, 151 Ill. 472, notwithstanding the omission from the declaration of the necessary allegation of knowledge by the defendant, the declaration was held good after verdict. So in City of East Dubuque v Burhyte 74 Ill. App. 99, and 173 Ill. 553. the declaration failed to aver either actual or constructive notice to the city of the defective condition of the sidewalk which caused the injury there involved, but it was held good after verdict. In N. K. Fairbank Co. v Bahre, 213 Ill. 636, the declaration ~~xx xxxx~~ did not in terms aver a certain material fact. The defendant did not demur but pleaded the general issue. The court conceded that a careful pleader would have expressly averred the fact but held that it was fairly inferable from the fact alleged that that particular fact was intended to be charged. It was there said that on demurrer to a declaration mere inferences or implications from facts stated cannot aid plaintiff, but that where defendant does not demur but raises issues of fact and submits them to a jury and is defeated, the court will indulge in intendments in favor of the sufficiency of the declaration and will regard as sufficiently alleged any material fact fairly and reasonably inferable from facts stated

in the declaration which may fairly be presumed to have been proven; and if the material fact is fairly inferable ffom the facts alleged and may fairly be presumed to have been proven the judgment will not be arrested because of the absence of an express allegation of such material fact from the declaration O'Rourke v Sproul, 241 Ill. 576. Mueller v Phelps, 252 Ill. 630.

While this question has usually arisen after verdict and it has usually been said in such a case that the declaration is good after verdict, yet there is also a class of cases where the same principles have been applied where the question arose before a jury trial. In North Chicago Rolling Mill Co. v Monka, 107 Ill. 340, the chief ruling complained of was before the trial of the cause , and the question raised was whether a certain additional count was for a cause of action in substance other and different from that stated in the first count. It was held that it was not, but was merely another mode of telling the ~~xtxxx~~ same story. The court said: "The damages sought are for the same injury alleged to have resulted from the defectiveness or insufficiency of the same machinery and that the existence of such defects was by reason of the default of the defendant." In Chicago City Railway Company v McMeen 206 Ill. 108, one of the principal questions arose upon demurrer to replications to pleas of the statute of limitations to an additionalcount filed after the statute had run. The court said that it might be true that the facts proved under the amendment were at variance with the allegations of the original declaration, and still it did not necessarily follow that the allegations of the amendment introduced an entirely new and distinct cause of action. This was illustrated in various ways, and the court held that although the amendment varied the details in several respects, yet so long as the identity of the matter upon which the action was founded was

preserved, it did not state a new cause of action . The court there quoted with approval from Alabama Great Southern Ry. Co. v Thomas, 89 Ala. 294 as follows:

"The various amendments allowed to the complaint do not, in our opinion, introduce a new cause of action different from that stated in the original count of the complaint. The gravamen of the action is an injury caused to twelve head of cattle shipped by the plaintiff on the defendant's railroad on April 29, 1886, which injury was alleged to be the result of the defendant's negligence. The several amendments each make a case based on some alleged violation of duty growing out of the undertaking to ship these same cattle. They may correct a misdescription of the contract as to the agreed point of destination of the cattle, or otherwise cure an imperfect statement of the same subject matter, or add new averments of facts more clearly showing the negligence complained of or otherwise altering the grounds of recovery, or varying the alleged mode in which the defendant has violated his duties growing out of the agreement embraced in the bill of lading; but they go no farther. The identity of the matter upon which the suit is founded is fully preserved. The amendments all fall within the lis pendens proper, and only subserve the purpose of accomplishing substantial justice between the parties and of deciding the pending controversy on its real and true merits. This is the main design of all statutes allowing amendments to pleadings. The Statute of Limitations of one year was for these reasons no sufficient answer to the new counts added to the complaint by way of amendment."

In L. S. & M. S. Ry.Co. v Enright, 237 Ill. 483, the trial court sustained a demurrer to the original declaration, and to the same declaration as amended, and held it did not state a cause

of action. Another amended declaration was filed after the statute had run. To this the defendant pleaded the general issue and the Statute of Limitations. The court sustained a demurrer to the Statute of Limitations. This ruling was before the cause was tried by the jury, and so was before verdict. The court held that even though the declaration as first amended stated a cause of action defectively, yet it stated a good cause of action and would have been good after verdict; and that the second amended declaration did not introduce a new cause of action but re-stated more perfectly the same cause of action stated in the first amended declaration, and that though the facts concerning the duty of the defendant were, perhaps, imperfectly averred in said first amended declaration, yet they were but a defective statement of a cause of action and would have been good after verdict, and therefore the court properly sustained the demurrer to the plea of the Statute of Limitations. In Hagan v Schleuter 236 Ill. 467, one of the questions discussed arose upon the ruling of the court in sustaining a demurrer to a plea of the Statute of Limitations to an amended declaration filed after the statute had run. This ruling was, therefore, before verdict. The original declaration averred the unsafe construction of a certain wall but did not state in what respect it was unsafe. The amended declaration specified the particulars in which it was unsafe and set out in full a contract which was only referred to in the original declaration, and contained averments as to the relations of the parties which had been omitted from the original declaration. It was held that the last amended declaration did not state a new cause of action, and that the court did not err in sustaining a demurrer to the plea of the Statute of Limitations. Vogrin v American Steel & Wire Co. 262 Ill.

of action. Another amended declaration was filed after the statute had run. To this the defendant pleaded the general issue and the Statute of Limitations. The court sustained a demurrer to the Statute of Limitations. This ruling was before the cause was tried by the jury, and so was before verdict. The court held that even though the declaration as first amended stated a cause of action defectively, yet it stated a good cause of action and would have been good after verdict; and that the second amended declaration did not introduce a new cause of action but re-stated more perfectly the same cause of action stated in the first amended declaration, and that though the facts concerning the duty of the defendant were, perhaps, imperfectly averred in said first amended declaration, yet they were but a defective statement of a cause of action and would have been good after verdict. The Supreme Court properly sustained the demurrer to the plea of the Statute of Limitations. In Hogan v. Schlueter 256 Ill. 467, one of the questions discussed arose upon the ruling of the court in sustaining a demurrer to a plea of the Statute of Limitations to an amended declaration filed after the statute had run. This ruling was, therefore, before verdict. The original declaration averred the unsafe construction of a certain wall but did not state in what respect it was unsafe. The amended declaration specified the particulars in which it was unsafe and set out in full a contract which was only referred to in the original declaration, and contained averments as to the relations of the parties which had been omitted from the original declaration. It was held that the last amended declaration did not state a new cause of action, and that the court did not err in sustaining a demurrer to the plea of the Statute of Limitations. Vogelin v. Hoffman 177 Ill. 234, 241.

474, is a recent application of similar principles where there was no verdict. There the court found in the language of the original declaration words which by reference were held to sufficiently admit of proof on the trial that at the time and place of the injury appellant was in the discharge of his duties as an employe of the appellee, although the charge was not made in language usually employed in common law pleadings for that purpose. It was held that the facts so found in the original declaration by implication and by reference, though not set out with the same particularity that they were in the amended declaration, authorized the filing of said amended declaration, and that the latter in no manner changed the ground on which appellant had originally predicated his cause of action. It therefore seems to be an established rule of pleading that though the question whether the cause of action stated in an amended declaration filed after the statute has run is the same cause of action as is stated in the original declaration usually arises after verdict, and it is usually said that the declaration is good after verdict; yet, where there has been no demurrer to the declaration and the question arises upon the pleadings before verdict, an amended declaration or an additional count filed after the statute has run will be held to only restate a good cause of action defectively stated in the original declaration, if the necessary allegations may be fairly and reasonably inferred or may reasonably be found to be implied in what is said in the original declaration.

The original declaration ~~in the case at bar~~ sufficiently alleged the location of this building in the City of Streator; that it had a stairway on the outside; that ~~appellee~~ owned the building at the time of the injury; that the stairway was

defective, rotten and unsafe; that ~~appellant~~ plaintiff fell through it and was injured; and that ~~appellee~~ defendant had made a contract with the husband of ~~appellant~~ plaintiff to keep it in repair. It is argued that the original declaration did not even defectively state a good cause of action because it did not set out facts which made it a duty appellee owed appellant to keep the stairway in repair, and because it did not show that appellant had any right to be upon that stairway when she was injured. The second count of the original declaration alleged that on or about May 28, 1910, ~~appellee~~ defendant entered into an agreement with Samuel Jacobson, the husband of ~~appellant~~ plaintiff, to keep the roof, stairway and outer walls of said building in good repair and condition. That count did not say in express terms that this agreement was in writing, but it said that a certain matter therein was "in words and figures as follows", ~~which plainly implies that it was not a verbal but a written agreement to which the pleader referred. At one place that count implies that the part quoted therein from the agreement is the entire agreement, but it is fairly inferred later that it was not the entire agreement, because the count avers that further ~~thereby~~ ~~appellee~~ defendant undertook to keep said stairway in good repair and condition until June 15, 1915, which ~~is~~ was not contained in what ~~is~~ was quoted from the agreement. Said second count, therefore, alleges an agreement between appellee and the husband of appellant to keep the stairway in good repair and condition, and that said agreement was in force at the time she was injured, and it plainly indicates that the agreement ~~in writing~~ was in writing and that only a part thereof was set out in that count. We are of the opinion that an amended declaration or an additional count, stating more fully the nature of said agreement, and explaining more fully why appellant was on said stairway, would not be the stating of a new cause of action, but would be stating what

might be reasonably inferred from what was alleged in said second count.

It would not be implied that an exterior stairway was put on as an ornament to the building, but rather that it was there for use and for the use of appellant's husband, and to enable persons who had the right to do so to pass between an upper story and the street. It would be presumed that appellant's husband had an object in requiring that the stairway should be kept in good repair, and that it was intended by the contract that he should use it in some way connected with his home or his business. With exceptions not applicable here, a wife has the natural right to go where her husband lawfully is. A somewhat analogous principle is [illegible] in [illegible] v. [illegible], [illegible] Ill. 277, and Kennedy v Kennedy, 87 Ill. 259. To state the occasion of her being on the stairway more fully would only be enlarging the particulars of that which is fairly inferable from said second count and fairly implied therein. The additional count set out said instrument in full, ~~(as was done in the amended declaration in Hagan v Schleuter, supra.)~~ and it therefore appeared that the agreement mentioned in the second count was a written lease of said building from ~~appellee~~ defendant to ~~appellant's~~ plaintiff's husband, to be used only as a store building and a flat for living rooms, and that ~~appellee~~ defendant was to so re-model the building that the upper floor should have suitable apartments for flat purposes. The proof was that the upper story was so re-modeled, and that at the time of the accident to ~~appellant~~ plaintiff, Samuel Jacobson and his family lived in the upper rooms, and that this stairway was their means of access to the street, and that ~~appellant~~ plaintiff lived there with her husband, and that she was passing between the street and their living rooms when this board of the stair way gave way beneath her and caused the injury. The additional count ~~declared~~ for the same injury to the ~~appellant~~ plaintiff, received upon the same stairway of the same building, by reason of the same defect, and only amplified and enlarges that which is fairly

to be inferred from what is said in the second count. We are of opinion that these were permissible enlargements and fuller statements of that which was imperfectly alleged in the second count, and that the Statute of Limitations was not a defense thereto.

A ppellee however contends that if said stairway was out of repair, it was only a breach of a covenant in the lease, and that the only action to which he would be liable would be in covenant for a breach thereof, and therefore no cause of action is stated even in the additional count. Whatever may be the rule in other jurisdictions, we think it clear from Sumasack v Morey 196 Ill. 569, and Borggard v Gale, 205 Ill. 511, that in this state, if a landlord has covenanted to keep the premises in repair, or has known and concealed defects therein from the tenant, and because of a failure to keep the premises in repair or because of the defects so concealed, either the tenant or ~~xxxx~~ any member of his family is injured, or any other person lawfully upon said premises for business or pleasure is injured, such person would be entitled to recover against the landlord for said injuries in an action on the case. In Borggard v Gale, supra, the wife of the tenant was the plaintiff, and though she failed to recover, it was only because of the insufficiency of the evidence.

We therefore conclude that the court erred in overruling the demurrer to the plea of the Statute of Limitations to the additional count, and erred in refusing to admit the lease in evidence, and erred in directing a verdict for appellee. The judgment is therefore reversed and the cause remanded for further proceedings in conformity with this opinion.

~~Rexxax~~ Reversed and remanded.

It be inferred from what is said in the second count. To use of
[illegible] that [illegible]
statements of that [illegible] was improperly alleged in the second
count, and that the [illegible] of limitations was not a defense
[illegible].

A [illegible] however contends that if said statutory was out
of [illegible], it was only a [illegible] of a covenant in the lease, and
that [illegible] only action to which he would be liable would be an
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in other jurisdictions, we think it clear from Gunnesson v Hovey
[illegible] 120, and Ferguson v Cole, [illegible] 111, that in this
state, if a landlord has covenanted to keep the premises in
repair, or has known and concealed defects therein from the
tenant, and [illegible] of a failure to keep the premises in repair
by reason of the defects so concealed, either the tenant or
any member of his family is injured, by any other person
[illegible] such injuries (in [illegible] of property or injuries
to person) would be entitled to recover against the landlord
for such injuries in an action on the case. In Ferguson v
Cole, supra, the wife of the tenant was the plaintiff, and though
she failed to recover, it was only because of the insufficiency
of the evidence.

We therefore conclude that the court erred in overruling the
demurrer to the plea of the Statute of Limitations to the addi-
tional count, and error in sustaining to count the same as evidence,
was equal in directing a verdict for appellee. The judgment is
therefore reversed and the cause remanded for further proceedings
in conformity with this opinion.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

6142

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 100

R H Dun Feb 1, 1916

BE IT REMEMBERED, that afterwards, to-wit: on DEC 27 1915 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6143.

James B. Paden,

Defendant in error.

vs Error to LaSalle.

The Chicago, Rock Island and

Pacific Railway Company,

Plaintiff in error.

Carnes, J.

~~James B. Paden, plaintiff below~~ [Plaintiff, was a teamster, ~~and~~ unloading coal from a car that had been placed on a side track by the ~~Chicago, Rock Island & Pacific Railway Company~~, the defendant ~~below~~, and while so engaged a switching crew of the defendant shoved another car against the one from which the plaintiff was taking coal with such force as to throw him to the ground and injure him. This suit was brought to recover for such injury. A jury trial resulted in a judgment for $1100.00 from which this writ of error is prosecuted.

It is contended that the declaration does not even defectively state a cause of action and that defendant's motion in arrest of judgment should have been sustained. This is the principal question in the case, the contention being that it does not appear that plaintiff was rightfully at the place where he received his injury, and therefore the defendant owed him no duty except not to wilfully injure him. The declaration ~~so far as it relates to this question~~, charges that the defendant in the use and operation of its railroad had a team or merchandise track connected with its road in the Village of DePue, in the County of LaSalle, which track was used by the defendant in placing cars thereon containing freight, so that parties entitled thereto might be enabled to unload said freight from said cars, or load freight into the cars; that on January

Gen. No. 6143.

James E. Paden,

Defendant in error.

vs. Error to LaSalle.

The Chicago, Rock Island and

Pacific Railway Company,

Plaintiff in error.

Carnes, J.

James E. Paden, plaintiff below, was a laborer, and in unloading coal from a car that had been placed on a side track by the Chicago, Rock Island & Pacific Railway Company, the defendant below, and while so engaged a switching crew of the defendant shoved another car against the one from which the plaintiff was taking coal with such force as to throw him to the ground and injure him. This suit was brought to recover for such injury. A jury trial resulted in a judgment for $1100.00 from which this writ of error is prosecuted.

It is contended that the declaration does not even defectively state a cause of action and that defendant's motion in arrest of judgment should have been sustained. This is the principal question in the case, the contention being that it does not appear that plaintiff was rightfully at the place where he received his injury, and therefore the defendant owed him no duty except not to wilfully injure him. The declaration so far as it relates to this question, charges that the defendant in the use and operation of its railroad had a team or merchandise track connected with its road in the Village of DePue, in the County of LaSalle, which track was used by the defendant in placing cars thereon containing freight, so that parties entitled thereto might be enabled to unload said freight from said cars, and that defendant then and there [illegible]

12, 1914, the plaintiff was engaged in unloading certain freight from one of the cars so used and operated by the defendant while said car was standing upon the said merchandise track.

Then follows allegations that the defendant, without warning etc. drove another car, etc.

It is said that the declaration might be true, and yet the plaintiff might be a trespasser. This is true, and the declaration would probably, for that reason, have been held bad on demurrer. But the question here is whether it is good after verdict. A similar declaration was before the court in Seibert v Vandalia R. Co. 179 Ill. App. 617. and the same contention there denied. There was an averment in the declaration in that case that the plaintiff was engaged in unloading freight from the car into the wagon, and had been so engaged all the day before the injury complained of and on the day of the injury up to two o'clock in the afternoon. Those avermente left the declaration less open to attack than is the declaration in the instant case, which contain no allegation as to the length of time the car had been there, or the plaintiff had been at work there, and there is much force in the defendant's argument that the declaration, considered under the rules announced in Mackey v Northern Milling Co. 210 Ill. 115, and McAndrews v C. L. S. & E. Ry. Co. 222 Ill. 232 does not even defectively state a cause of action. Our attention is also called to our own decision in Vogrin v American Steel & Wire Co. 179 Ill. App. 245, where we endeavored to apply the rule announced in

12, 1914, the plaintiff was engaged in unloading certain freight from one of the cars so used and operated by the defendant while said car was standing upon the said merchandise track.

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App. 245, where we endeavored to apply the rule announced in those two cases and erred in the effort so to do, as appears from the decision of the supreme court in 263 Ill. 475. We are inclined to the opinion that the rule announced in the Mackey and McAndrews cases should not be extended farther than is required by those decisions, and that it should not be applied to this case. We do not see how the lack of averment that the plaintiff was lawfully engaged in removing merchandise from the car can be held a more serious defect than would have been a failure to aver that he was at the time in the exercise of due care for his own safety, and the court held in B. & O. S. W. Ry. Co. v Then 159 Ill. 535, the failure to aver due care was cured by verdict, and used the following language:- "Where there is any defect, imperfection or omission in any pleading, whether in substance or in form, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so imperfectly or defectively stated or omitted. and without whichit is not to be presumed that the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by verdict. 1 Chitty's Pleading (14th. Am. ed.) 675; Illinois Central Railroad Co. v Simmons, 38 Ill. 242; Atchison, Topeka and Santa Fe Railroad Co. v Feehan, 149 id. 202. In the case at bar it is not to be presumed the jury would have given the verdict, or that the court would have sustained it, without evidence tending at least to establish the fact of due care on the part of the deceased. The "motion in arrest was properly overruled."

The Illinois authorities on this subject are collected and reviewed in Jacobson v Ramey. Gen. No. 6076

App. 246, where we answered to supply the rule announced in those two cases and erred in the effort so to do, as appears from the decision of the supreme court in 265 Ill. 475. We are inclined to the opinion that the rule announced in the Mosley and McAnarney cases should not be extended farther than is required by those decisions, and that it should not be applied to this case. We do not see how the lack of averment that the plaintiff was lawfully engaged in removing merchandise from the car can be held a more serious defect than would have been a failure to aver that he was at the time in the exercise of due care for his own safety, and the court held in R. & O. S. W. Ry. Co. v. Then 159 Ill. 535, the failure to aver due care was cured by verdict, and used the following language:- "Where there is any defect, imperfection or omission in any pleading, whether in substance or in form, which would have been a total objection on demurrer, yet if the issue joined be such as necessarily requires, on the trial, proof of the facts so imperfectly or defectively stated or omitted, and without which it is not to be presumed that the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by verdict. 1 Chitty's Pleading (14th. Am. ed.) 675; Illinois Central Railroad Co. v. Slocum, 4 Ill. 244; Atchison, Topeka and Santa Fe Railroad Co. v. Feehan, 149 Id. 202. In the case at bar it is not to be presumed the jury would have given the verdict, or that the court would have sustained it, without evidence tending at least to establish the fact of due care on the part of the deceased. The "motion in arrest was properly overruled."

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------Ill. App. -----.

We think the declaration must be held good after verdict. therefore the court did not err in overruling the motion in arrest of judgment.

The gist of the charge in the declaration of the defendant's negligence is that it pushed the car upon the one which the plaintiff was unloading without giving him warning. While there is some conflict in the evidence, it abundantly sustains the declaration in that respect and it is not seriously contended that it does not. There is no contention, or ground for contention, that the verdict is excessive if the jury were warranted in believing the plaintiff's evidence as to the extent of his injuries, and we think they were warranted in so doing. No error is argued as to the rulings of the court on the admission of evidence. The only instruction given at the instance of plaintiff was on the measure of damages. The injury claimed was an aggravation of a hernia, from which the plaintiff had been sometime suffering, and there was evidence before the jury as to a surgical operation performed on plaintiff after the time in question, ~~and a fair question was presented as to how much of the disability under which plaintiff was suffering resulted from the accident.~~ The instruction complained of informed the jury that if they found the defendant guilty in assessing damages "they should take into consideration all the facts and circumstances shown by the evidence before them; the nature and extent of the plaintiff's physical injuries, if any, so far as the same are alleged in the declaration and shown by the evidence." It is urged that under the evidence in this case which required discrimination by the jury between the disability resulting from the accident and charged in the declaration, and disability

III. Apt. ------.

We think the instruction must be held good after verdict. therefore the court did not err in overruling the motion in arrest of judgment.

The gist of the charge in the declaration of the defendant's negligence is that it placed the car upon the alone which the plaintiff was unloading without giving him warning. While there is some conflict in the evidence, it is abundantly evident the declaration in that respect and it is not seriously contended that it does not. There is no contention, or ground for contention, that the verdict is excessive if the jury were warranted in believing the plaintiff's evidence as to the extent of his injuries, and we think they were warranted in so doing. No error is argued as to the rulings of the court on the admission of evidence. The only instruction given at the instance of plaintiff was on the measure of damages. The injury claimed was an aggravation of a hernia, from which the plaintiff had been suffering, and there was evidence before the jury as to a surgical operation performed on plaintiff after the time in question. ~~A fair question was presented as to his mental condition~~ vulnerability under which plaintiff was suffering resulted from the accident. The instruction complained of informed the jury that if they found the defendant guilty in assessing damages "they should take into consideration all the facts and circumstances shown by the evidence before them; the nature and extent of the plaintiff's physical injuries, if any, so far as the same are alleged in the declaration and shown by the evidence." It is urged that under the evidence in this case which required discrimination by the jury between the liability resulting from

that did not result from the accident, it is likely that the jury were misled and acted on the belief that damages could be assessed for the disability regardless of its source We do not understand counsel to contend that the instruction would be bad except upon his peculiar condition of the record. It is true that in cases where the plaintiff is suffering disability that may have arisen only in part from the injury complained of, instructions as to the measure of damages that might otherwise be good should be carefully guardded and the jury clearly informed that damages can only be based on the injury complained of. This instruction referred the jury to the declaration and limited the injuries to those there charged, and the court, at the instance of the defendant, ~~very clearly and forcibly~~ instructed the jury that the damages must be confined to such as ~~are~~ were the natural proximate result of the defendant's neglect; that the burden of proof was on the plaintiff to show his injuries were caused by the defendant's neglect, and if they believed that the injuries from which plaintiff complained resulted from other causes than the defendant's ~~ongkect~~ negligence that the complainant could not recover anything for injuries and specifically told them if they found from the evidence that the condition of the plaintiff's rupture which necessitated the operation he underwent did not result from the accident of which he complains as a natural and proximate consequence, but was a condition in no way connected therewith, then in determining what his damages were they should leave out of consideration the fact of the operation, the time lost thereby, and the expense paid and suffering connected therewith. We think that the instruction was one that could be properly given in ordinary cases, but that it needed qualifying under the facts in this case, and that the other instructions before mentioned fully served that purpose.

that did not result from the accident, it is likely that the jury were misled and acted on the belief that damages could be assessed for the disability regardless of its source. We do not understand counsel to contend that the instruction would be bad except upon this peculiar condition of the record. It is true that in cases where the plaintiff is suffering disability that may have arisen only in part from the injury complained of, instructions as to the measure of damages that might otherwise be good should be carefully guarded and the jury clearly informed that damages can only be based on the injury complained of. This instruction referred the jury to the declaration and limited the injuries to those therein charged, and the court, at the instance of the defendant, very clearly and forcibly instructed the jury that the damage must be confined to such as are the natural proximate result of the defendant's neglect; that the burden of proof was on the plaintiff to show his injuries were caused by the defendant's neglect, and if they believed that the injuries from which plaintiff complained resulted from other causes than the defendant's negligence that the complainant could not recover anything for injuries and specifically told them if they found from the evidence that the condition of the plaintiff's injury which necessitated the operation he underwent did not result from the accident of which he complains as a natural and proximate consequence, but was a condition in no way connected therewith, then in determining what his damages were they should leave out of consideration the fact of the operation, the time lost thereby, and the expense paid and suffering connected therewith. We think that the instruction was one that could be properly given in ordinary cases, but that it needed qualifying under the facts in this case, and that the other

The size of the verdict indicates that the jury were not misled in that respect. Finding no error in the record the judgment is affirmed.

Affirmed.

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AFFIRMED.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 104

P H Dem Feb 1/16

BE IT REMEMBERED, that afterwards, to-wit: on DEC 27 1915 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6821.

Joseph H. Paxton, et al. appellees

vs Appeal from Lake.

William H. Fabry, et al appellants.

Carmes, J.

Sometime prior to August 1914, ~~appellant~~ defendant Bradford E. Simmons, was the owner of a store building and lot on which it was located, in Zion City, Lake County, Illinois, and the other ~~appellants~~ defendants, William H. Fabry and M. T. Ellis were using a part of it under a lease from Simmons, as a drug store in which they also sold cigars. A resident physician had an office in the b ilding. On May 3rd. 1915, after this condition had existed for none months or more, ~~appellees~~ plaintiffs, fourteen lessees of residente properties in the City of Zion, filed a bill for injunction to restrain such use of said building, and applied to the court for an interlo cutory decree enjoining such use pending the liti ation. The application was heard on the bill and affidavits in support thereof, and affidavits of the defendants who appeared and without answering the bill, resisted the application. A decree was entered restraining the defendants, until the further order of the court, from using any part of said premises as a cigarette, cigar or tobacco store; or a place for the manufacture or sale of to bacco in any form or manner; or pharmacy, apothecary shop, or drug store; or a place for the manufacture of sale of drugs or medicines of any kind; or the office or residence of a practicing physician, surgeon, or other person actua ly engaged in the practice of medicine or surgery. The defendants prosecute this appeal, and the question here is whether the trial court was acting within its sound judicial discretion under established legal principles in granting the preliminary injunction.

Gen. No. 6821.

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vs Appeal from Lake.

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Carmen, J.

Sometime prior to August 1914, appellant Bradford K. Simmons, was the owner of a store building and lot on which it was located, in Zion City, Lake County, Illinois, and the other appellants, William H. Fabry and M. F. Hills were using a part of it under a lease from Simmons, as a drug store in which they also sold cigars. A resident physician had an office in the building. On May 3rd, 1915, after this condition had existed for some months or more, appellees, fourteen lessees of residence properties in the City of Zion, filed a bill for injunction to restrain such use of said building, and applied to the court for an interlocutory decree enjoining such use pending the litigation. The application was based on the bill and affidavits in support thereof, and affidavits of the defendants who appeared and without answering the bill, resisted the application. A decree was entered restraining the defendants, until the further order of the court, from using any part of said premises as a cigarette, cigar or tobacco store; or a place for the manufacture or sale of to bacco in any form or manner; or pharmacy, apothecary shop, or drug store; or a place for the manufacture of sale of drugs or medicines of any kind; or the office or residence of a practicing physician, surgeon, or other person actually engaged in the practice of medicine or surgery. The defendants prosecute this appeal, and the question here is whether the trial court was acting within its sound judicial discretion under established legal principles in granting the preliminary injunction.

The affidavits read on the hearing are incorporated in the record, certified by the clerk of the court. There is no certificate of evidence, therefore we assume that we cannot take notice of their contents. (Lange v Meyer, 195 Ill. 420; Wheatley v Mracek and Oettert, 180 Ill. App. 646.) We will assume for the purpose of this decision that the court on a consideration of the bill and all the affidavits filed, was warranted in finding that the allegations of fact found in the bill were true. The theory of the bill ~~is~~ was that John Alex. Dowie, in his lifetime, prior to 1899, organized a religious sect opposed to the business and practices sought to be enjoined, and various other forms of business regarded legitimate and proper in civilized communities, and still other practices that are generally condemned as immoral and illegal; that in 1899 the site of Zion City was selected as the location of the society in which such business and practices should be prohibited; that in furtherance of that purpose Dowie obtained title to nearly all the land within the present city limits and executed leases for the term of 1100 years containing restrictive covenants against said uses; that a building plan was also adopted to that end, and various statements were publicly made and published by Dowie proclaiming such purpose; that afterwards Dowie became insolvent and with his property, including a large portion of the land within the limits of Zion City, passed into the hands of a receiver under the control of a federal court, and the receiver made sales of the property in various ways and under various restrictions that resulted in maintaining such restrictions as to all land sold; that the result of these facts ~~is~~ was that the owners of land in the City of Zion holding by or under titles containing such restrictive covenants ~~are~~ were bound by the covenants, and also that the owners of land there situated

The affidavits read on the hearing are incorporated in the record, certified by the clerk of the court. There is no certificate of evidence, therefore we assume that we cannot take notice of their contents. (Lange v Hoyer, 125 Ill. 430; Wheatley v Brown and Gerstert, 180 Ill. App. 646.) We will assume for the purpose of this decision that the court on a consideration of the bill and all the affidavits filed, was warranted in finding that the allegations of fact found in the bill were true. The theory of the bill is that John Alex. Dowie, in his lifetime, prior to 1899, organized a religious sect opposed to the business and practices sought to be enjoined, and various other forms of business regarded legitimate and proper in civilized communities, and still other practices that are generally condemned as immoral and illegal; that in 1899 the site of Zion City was selected as the location of the society in which such business and practices should be prohibited; that in furtherance of that purpose Dowie obtained title to nearly all the land within the present city limits and executed leases for the term of 1000 years containing restrictive covenants against said uses; that a building plan was also adopted to that end, and various state acts were publicly made and published by Dowie proclaiming such purpose; that afterwards Dowie became insolvent and, with his property, including a large portion of the land within the limits of Zion City, passed into the hands of a receiver under the control of a federal court, and the receiver made sales of the property in various ways and under various restrictions that resulted in maintaining such restrictions as to all land sold; that the result of these facts is that the owners of land in the City of Zion building by or under title containing such restrictive covenants are bound by the covenants, and also that the owners of land there situated

holding under titles in which there were are no restrictive covenants were also bound if they purchased with knowledge of the plan upon which the said city was founded.

Appellees' able counsel required two hundred pages of typewriting to set forth in the bill the matters relied on by them to support their right to an injunction. Very full, exhaustive briefs and arguments are presented here by counsel for both sides on the legal effect of the allegations in the bill. The briefs are for the most part devoted to questions that must be determined by a court on the final hearing of the cause calling for an investigation of the merits of the case that is not undertaken by either trial or reviewing courts in determining the propriety of a preliminary injunction. It is urged in the arguments that a matter of public interest concerning the title to much property is involved, which is manifestly true, and such questions might better be left to the final hearing and be decided in a proceeding where the decree of the trial court can reach the supreme court for review that principles may be announced that can be acted upon as rules of property. Any decision that we may render, or view that we may express has no binding effect on persons or property not included in this suit, and there is no appeal from this court in this case. There seems to be a dearth of authority in this state on some of the questions here involved, yet we think the principles are well established and settled on the authority of the text books on the subject, and decisions of other states. Our supreme court in People v Grand Trunk Ry. Co. 233 Ill. 292, quoting from a former case said, speaking of the remedy by injunction: "The tendency seems to be to greatly abuse it." The appellate court of the first district in Young v Federal Union Surety Co. 183 Ill. App. 470, cited Beach on Injunctions, Sec. 110 and High on Injunctions, Sec. 13, on the proposition that the merits of the case are not

holding under titles in which there are no restrictive covenants are also bound if they purchased with knowledge of the plan upon which the said city was founded.

Appellees' able counsel required twenty-two pages of typewriting to set forth in the bill the matters relied on by them to support their right to an injunction. Very full, exhaustive briefs and arguments are presented here by counsel for both sides on the legal effect of the allegations in the bill. The briefs are for the most part devoted to questions that must be determined by a court on the final hearing of the cause omitting for an investigation of the merits of the case that is not undertaken by either trial or reviewing courts in determining the propriety of a preliminary injunction. It is urged in the arguments that a matter of public interest concerning the title to much property is involved, which is manifestly true, and such questions might better be left to the final hearing and be decided in a proceeding where the decree of the trial court can reach the supreme court for review that principles may be announced that can be acted upon as rules of property. Any decision that we may render, or view that we may express has no binding effect on persons or property not included in this suit, and there is no appeal from this court in this case. There seems to be a dearth of authority in this state on some of the questions here involved, yet we think the principles are well established and settled on the authority of the text books on the subject, and decisions of other states. Our supreme court in Swopis v Grand Trunk Ry. Co. 232 Ill. 466, quoting from a former case said, speaking of the remedy by injunction: "The tendency seems to be to greatly abuse it." The appellate court of the first district in Young v Federal Union Surety Co. 183 Ill. App. 472, cited Beach on Injunctions, Sec. 110 and High on Injunctions,

passed on in considering a preliminary injunction, but the court should inquire whether less harm will result to the enjoined party if he should be finally victorious than would accrue to the complainant from the absence of the injunction if he were a winning party, and quoted from Russell v Farley 105 U. S. 433:

"It is a settled rule of the court of chancery in actions on applications for injunctions, to regard the comparative injury which would be sustained by the defendant if an injunction were granted, and by the complainant if it were refused. (Kerr on Injunctions, 209, 210) And if the legal right is doubtful either in point of law or fact, the court is always reluctant to take a course which may result in material injury to either party."

And from the City of Newton v Levis, 25 CCA 161:-

"When the questions to be ultimately decided are serious and doubtful, the legal discretion of the judge in granting the writ should be influenced largely by the consideration that the injury to the moving party will be certain, great and irreparable if the motion is denied, while the inconvenience and loss to the opposing party will be inconsiderable and may well be indemnified by proper bond if the injunction is granted."

It is said in A. & E. Enc. of Law, Vol. 16, page 548, a preliminary injunction may sometimes be properly refused upon the same facts which would entitled the party of right to an injunction on final hearing. It is said in 32 Cyc. page 720 the object of a preliminary injunction is "To maintain the status quo; to maintain property in its existing condition; to prevent further or impending injury - not to determine the right itself." On page 741- "It will not be granted where it is not apparent that any injury at all will occur."

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It is said in A. & E. Enc. of Law, Vol. 16, page 346, a preliminary injunction may sometimes be properly refused upon the same facts which would entitled the party of right to an injunction on final hearing. It is said in 22 Cyc. page 740 the object of a preliminary injunction is "To maintain the status quo; to maintain property in its existing condition; to prevent further or impending injury - not to determine the right itself." On page 741- "It will not be granted where it is not apparent

Andon page 749 - "Great caution is to be used in issuing mandatory injunctions. * * * * * * The complainant must make out a clear case free from doubt and dispute."

On page 751 - The issuance of a temporary injunction to maintain the status quo depends chiefly upon the relative inconvenience to be caused the parties.

And on page 753; "The right asserted by complainant, however mustbe perfectly clear and free from doubt where the effect of a preliminary injunction will be more than merely the maintenance of the status quo, or where theinjunction will cause defendant greater loss and inconvenience than that which will be suffered by the complainant in the absence of an injunction. In any event, an injunction must be refused * * * * * if he (Complainant) does not make it appear reasonably probable that an irreparable injury is impending and will occur before the final hearing can be had."

On page 756; "When the question of law is one of the chief issues to be determined on the final hearing, and complete relief can be then afforded, the complainant is not entitled to the preliminary injunction. An injunction will not be granted where there is grave doubt as to its propriety or necessity."

On page 762, "A preliminary injunction will not, as a general rule, be granted in cases where it is not shown that any irreparable injury is immediately impending and will be visited upon complainant before the case can be brought to a final hearing."

The above quotations from the text of Cyc are most of them supported by a great number of citations, generally from the reports of other states and the federal courts. The author, however, does not note any decision of this state in conflict with the general principles that he announces. A reference

Ambon page 740 - "Great caution is to be used in issuing mandatory injunctions. * * * * * The complainant must make out a clear case free from doubt and dispute."

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And on page 733; "The rights asserted by complainant, however maybe perfectly clear and free from doubt where the effect of a preliminary injunction will be more than merely the maintenance of the status quo, or where the injunction will cause defendant greater loss and inconvenience than that which will be suffered by the complainant in the absence of an injunction. In any event, an injunction must be refused * * * * if the (complainant) does not make it appear reasonably probable that an irreparable injury is impending and will occur before the final hearing can be had."

On page 736; "When the question of law is one of the chief issues to be determined on the final hearing, and complete relief can be then afforded, the complainant is not entitled to the preliminary injunction. An injunction will not be granted where there is grave doubt as to its propriety or necessity."

On page 738, "A preliminary injunction will not, as a general rule, be granted in cases where it is not shown that any irreparable injury is immediately impending and will be visited upon complainant before the case can be brought to a final hearing."

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to the volumes of "Annotations of Cyc" showing decisions on these various points since the publication of the volume from which we have quoted, discloses that most of these principles have since that time beenrestated or recognized again and again by our federal and state courts. This opinion might be extended to great length by citing and discussing those cases.

In the late case of McMillan v Kuehnle, 78 N. J. Eq. 351, the court considered an application for a temporary injunction by owners of dwelling houses near a baseball park to restrain holding baseball games there on Sunday, the bill charging that crowds attending the game, by noise and confusion, disturbed the peace and quiet of the neighborhood, and held them not entitled to the writ. The court said.-

"Such a writ ought never to be ordered unless from the pressure of an urgent necessity. The damage which it is legitimate to prevent during the pendency of a suit must be in an equitable point of view of an irreparable character". (Citing authorities) And quoting from an earlier authority - "It is impossible to emphasize too stringly the rule so often enforced by this court that a preliminary injunntion will not be allowed when the injury which may result from the invasion of the complainant's right is not irreparable." and added - That the injury complained of could not be considered as an irreparable mischief and that if it be conceded that the disturbance is of such a character as to entitle complainants to an injunction on a final hearing of the cause, still it is not so substantial as to warrant the issuing of a temporary writ.

In Meyer v Somerville Water Co, 79 N. J. Eq. 613, the court said "The object of a preliminary injunntion is to prevent some threatening irreparable injury pending a full and deliberate investigation of the case upon the merits. It will not be ordered unless from the pressure of an urgent necessity and where the damage threatened during the pendency of the suit is of an

to the volumes of "Annotations of Cyc" showing decisions on these various points since the publication of the volume from which we have quoted, disclosed that most of these principles have since that time been restated or recognized again and again by our federal and state courts. This opinion might be extended to great length by citing and discussing these cases.

In the late case of McMillan v Kuehnle, 78 N. J. Eq. 251, the court considered an application for a temporary injunction by owners of dwelling houses near a baseball park to restrain holding baseball games there on Sunday, the bill charging that crowds attending the game, by noise and commotion, disturbed the peace and quiet of the neighborhood, and held them not entitled to the writ. The court said,-

"Such a writ ought never to be ordered unless from the pressure of an urgent necessity. The damage which it is legitimate to prevent during the pendency of a suit must be in an equitable point of view of an irreparable character". (Citing authorities) And quoting from an earlier authority - "It is impossible to emphasize too strongly the rule so often enforced by this court that a preliminary injunction will not be allowed when the injury which may result from the invasion of the complainant's right is not irreparable." and added - That the injury complained of could not be xxxxxxxx considered as an irreparable mischief and that if it be conceded that the disturbance is of such a character as to entitle complainants to an injunction on a final hearing of the cause, still it is not so substantial as to warrant the issuing of a temporary writ.

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irreparable character." (Citing authorities)
In the case of Blanchard v Eastern Pennsylvania Power Co. 80 N. J. Eq. 10, it is held if the complainants case rests on a legal right which is not clear and has beenfairly questioned then a preliminary injunction cannot be granted. (Citing authorities) In Fredericks v Huber, 180 Penn. St. 578. the court, in holding a prelininary injunction, restraining the use ofa church improperly granted, said that its effect was practically to reverse the whole status of the parties, and added - "This is not the office of a preliminary injunction, which is not to subvert but to maintain the existing status until the merits of the controversy can be fully heard and determined."
And adds - "That the status quo which will be preserved by preliminary injunction is the last actual, peaceable, noncontested status which preceded the pending controversy."
In Snod grass v McDanielk, 144 Iowa, 674, the court applied the rule that the purpose of a temporary injunction is to preserve the status quo of the parties and not to obtain affirmative relief in advance of the trial.
We find in Richards v Meissner 158 Fed. Rep. 109, the following language in relation to granting a preliminary injunction- "While it does not finally determine the rights of the parties to the action, and is intended only to preserve the existing status until the case can be fully heard, and therefore as it is not necessary that the court should, before granting it, be satisfied that the complainant will certainly prevail upon the final hearing of the case, the court should, nevertheless, be careful that the complainant has a probable right, and that there is probable danger that such right will be defeated without the special interposition of the court. It is equally true that where, on the showing made at the preliminaryhearing,

irreparable character." (Citing authorities)

In the case of Blanchard v Lehigh Pennsylvania Power Co. 90 N. J. Eq. 10, it is held if the complainants case rests on a legal right which is not clear and has seriously questioned then a preliminary injunction cannot be granted. (Citing authorities) In Frederick v Huber, 180 Penn. St. 578. the court, in holding a preliminary injunction, restraining the use of church improperly granted, said that its effect was practically to reverse the whole status of the parties, and added - "This is not the office of a preliminary injunction, which is not to subvert but to maintain the existing status until the merits of the controversy can be fully heard and determined."

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We find in Richards v Metzenor 158 Fed. Rep. 108, the following language in relation to granting a preliminary injunction-

"While it does not finally determine the rights of the parties to the action, and is intended only to preserve the existing status until the case can be fully heard, and therefore it is not necessary that the court should, before granting it, be satisfied that the complainant will certainly prevail upon the final hearing of the case, the court should, nevertheless, be careful that the complainant has a probable right, and that there is probable danger that such right will be defeated without the special interposition of the court. It is equally true that where, on the showing made at the preliminary hearing,

the law as to the right to an injunction is quite doubtful and that as much, if not more, injury would probably ensue to the defendants than to the complainants, and especially where in the event of the bill being dismissed on final hearing, there is grave doubt of an adequate redress to the defendant resulting from the injunction, the court should refuse the application for a temporary injunction, and await action until all the facts appear on final hearing."

The principles announced in the foregoing authorities seem reasonable, and we think they might be taken as a guide by courts of this state in passing on motions for temporary injunctions. Even on final hearing our supreme court has said in Hill v Kimball, 269 Ill. 398:- "In cases where mandatory injunctions are asked for, ' it is the duty of the court to consider the inconvenience and damage that will result to the defendant as well as the benefit to accrue to the complainant by the granting of the writ, and where the defendant's damages and injuries will be greater by granting the writ than will be the complainant's benefit by granting the writ, or greater than will be complainants damages by the refusal of it, the court will, in the exercise of a sound discretion, refuse the writ.'" (Lloyd v Catlin Coal Co. 210 Ill. 460; Dunn v Youmans, 224 id. 34; 1 High onInjunctions, 4th. Ed. sec. 2. and cases cited.) Applying those rules to this case we are unable to see any valid reason for the decree. If we assume that the complainants will, on final hearing, be entitled to an injunction, still the maintaining of the ordinary drug store and physician's office in the City of Zion during the pendency of the suit was not such a threatened mischief and injury as should be held irreparable in passing on a motion for a temporary injunction. The restraining order did not issue to maintain the status quo, but was in the

the law as to the right to an injunction is quite doubtful and that as much, if not more, injury might probably accrue to the defendants that to the complainants, and especially where in the event of the bill being dismissed on final hearing, there is grave doubt of an adequate redress to the defendant resulting from the injunction, the court should refuse the application for a temporary injunction, and await action until all the facts appear on final hearing."

The principles announced in the foregoing authorities seem reasonable, and we think they might be taken as a guide by courts of this state in passing on actions for temporary injunctions. Even on final hearing our supreme court has said in Hill v Kimball, 205 Ill. 388:- "In cases where mandatory injunctions are asked for, ' it is the duty of the court to consider the inconvenience and damage that will result to the defendant as well as the benefit to accrue to the complainant by the granting of the writ, and where the defendant's damage and injuries will be greater by granting the writ than will be the complainant's benefit by granting the writ, or greater than will be complainants damage by the refusal of it, the court will, in the exercise of a sound discretion, refuse the writ." (Lloyd v Griffin Coal Co. 210 Ill. 460; Dunn v Donahue, 204 id. 34; 1 High on injunctions, 4th. Ed. sec. 2. and cases cited.) Applying those rules to this case we are unable to see any valid reason for the decree. If we assume that the complainants will, on final hearing, be entitled to an injunction, still the maintaining of the cigar store and physician's office in the City of Zion during the pendency of the suit was not such a threatened minister and injury as should be held irreparable in passing on a motion for a temporary injunction. The restraining order did not issue to restrain the defendants, but was in the

nature of a mandatory injunction granting the relief sought by the bill in advance of a hearing on the merits, and therefore such as will not ordinarily be granted. There is grave doubt about the law upon which the complainants' right to ultimate relief rests, Many questions arise as to the legal effect of various facts averred in the bill, and whether a sound consideration of public policy will permit the enforcement of the restrictive covenants relied on can only be known after a final devision of a court of last resort; and finally, the injury and mischief inflicted by a wrongful issuing if the writ suspending an established business during the pendency of the suit is one that cannot be adequately compensated in damages, and therefore the defendants could not be adequately protected by the bond required, while the injury that would be sustained by the complainants in wrongfully refusing the writ is of little importance.

We are of opinion that the writ should not have issued and that the trial court was not acting within its sound judicial discretion in entering the decree awarding it, therefore the decree should be reversed.

Reversed.

nature of a mandatory injunction granting the relief sought by the bill in advance of a hearing on the merits, and therefore such as will not ordinarily be granted. There is grave doubt about the law upon which the complainants' right to ultimate relief rests. Many questions arise as to the legal effect of various facts averred in the bill, and whether a sound consideration of public policy will permit the enforcement of the restrictive covenants filed on can only be known after a final decision of a court of last resort; and finally, the injury and mischief inflicted by a wrongful issuing of the writ suspending an established business during the pendency of the suit is one that cannot be adequately compensated in damages, and therefore the defendants could not be adequately protected by the bond required, while the injury that would be sustained by the complainants in wrongfully refusing the writ is of little importance.

We are of opinion that the writ should not have been granted and that the trial court was not acting within its sound judicial discretion in entering the decree awarding it, therefore the decree should be reversed.

Reversed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 115

BE IT REMEMBERED, that afterwards, to-wit: on FEB 8 1915 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6144.

Christine L. Palm, appellant.

vs Appeal from Winnebago.

Rockford City Traction Company, Appellee.

Dibell, P. J.

On the 27th. day of January, 1912, at the corner of Second Avenue and Seventh Street, in the city of Rockford in Winnebago County, Christine L. Palm fell from the step of a car operated by the Rockford City Traction Company and received injuries, for which she brought this suit to recover damages. She filed a declaration, to which there was a plea of the general issue. Later she obtained leave to file, and did file, four additional counts, to which there was also a plea of the general issue. At the trial at the January term 1915, of the circuit court of that County, leave was given the plaintiff to amend her declaration, which she did, by alleging that the conductor of the street car negligently permitted the exit door of the car to remain open while the car was in motion, which induced the plaintiff to believe that she could safely alight and in doing so she was injured because the car had not been stopped. The defendant demurred to the amendment but the demurrer was overruled and the plea of the general issue formerly made to the original declaration, was ordered to stand as the plea to the amended count. At the close of all the evidence the court instructed the jury to return a verdict for the defendant, which was done, a motion for a new trial was overruled and the defendant had judgment against the plaintiff, from which plaintiff below appeals.

The car in question was of the "Pay-as-you-enter" type and appears to have differed in at least one important respect from the cars of that type now in use. The rear platform was inclosed

Sec. Sc. 1111.

Contributing - Fall, negligence.

vvs Appeal from Winnebago.

Rockford City Traction Company, appellee.

Dunell, P. J.

On the 27th day of January, 1912, at the corner of Rockford Avenue and Seventh Street, in the city of Rockford in Winnebago County, Christine L. Pflum fell from the step of a car operated by the Rockford City Traction Company and received injuries, for which she brought this suit to recover damages. She filed a declaration, to which there was a plea of the general issue. Later she obtained leave to file, and did file, four additional counts, to which there was also a plea of the general issue. At the trial at the January term 1915, of the circuit court of that County, leave was given the plaintiff by means her declaration, which included, by alleging that the conductor of the street car negligently permitted the exit door of the car to remain open while the car was in motion, which induced the plaintiff to believe that she could safely alight and in doing so she was injured because the car was started. The defendant demurred to the declaration but the demurrer was overruled and the plea of the general issue formerly made to the original declaration, was ordered to stand as the plea to the amended count. At the close of all the evidence the court instructed the jury to return a verdict for the defendant, which was done; a motion for a new trial was overruled and the defendant had judgment against the plaintiff, from which plaintiff below appeals.

The law in question was in the "far-reaching-effect" type and appears to have differed in it from the Illinois statutory provisions in the case of that type now in use. The case and one was brought

and on the right hand side of this platform was a step and two doors, the rear one of these two doors being used as an entrance to the car and the other as an exit. The exit door was not under the sole control of the conductor, but could be opened by any one desiring to alight from the car. On boarding the car through the rear of these two doors on the right handside of the car, an intending passenger would proceed along a railing, extending [illegible] the platform, [illegible] the left hand side of the platform, and such passenger would turn to the right, give his fare to the conductor or place it in a box provided for that purpose, mount one step and go through a door into the body of the car. A passenger desiring to alight from this car would pass through a door at the rear of the main body of the car, on the other side of the car from the door by which he entered the main body of the car, and, upon stepping down on to the platform, turn to the left and either open the outside door himself or have the conductor do it for him and go from the platform on to a step and thence up to the street. ~~While the evidence is not quite clear on this point,~~ It appeared that this exit door was not controlled by any lever at the hand of the conductor, but was opened by a handle attached to the door itself. The position of the conductor ordinarily, and at the time of the accident here in question was, on the platform between the entrance and exit doors leading to and from the body of the car and behind the railing mentioned above. The exit door, used in passing from the platform to the street, swung back against the railing when open and, as the space into which an outgoing passenger stepped was about two feet square it will be seen that when such an outgoing passenger stepped onto the platform from the main body of the car, his presence would prevent the closing of the door, [illegible], or its opening, if it was closed, by the conductor, who would under such circumstances be standing behind such passenger.

[illegible] the rear one of these two doors being used as an entrance to the car and the other as an exit. The exit door was not under the sole control of the conductor, but could be opened by any one desiring to alight from the car. On opening the car through the rear door of these two doors on the right hand side [illegible] the car, [illegible] the platform, [illegible] the platform, [illegible] the car. A passenger desiring to alight from this car would pass through a door at the rear of the main body of the car, on the right hand side of the car, and, upon stepping down on to the platform, turn to the left and either open the outside door himself or have the conductor do it for him and go from the platform on to the step and thence up to the street. ~~While the evidence is not quite clear on this point,~~ It appears that this exit door was not controlled by any lever at the hand of the conductor, but was opened by a handle attached to the door itself. The position of the conductor ordinarily, and at the time of the accident here in question was on the platform between the entrance and exit doors leading to and from the body of the car and behind the railing mentioned above. The exit door, when in passing from the platform to the street, swung open against the railing when open and, as the proofs indicate which an outgoing passenger stepped was about two feet square it will be seen that when such an outgoing passenger alighted on the platform from the main body of the car, his presence would prevent the closing of the door, if it was open, as the evidence shows, if it was closed, by the conductor, who would under

~~Appellant~~ Plaintiff became a passenger on this car about six o'clock on the evening in question. It was after dark and the lights in the car on the street and in the stores along the street, were lighted. As the car neared Second Avenue, ~~appellant~~ Plaintiff pressed a push button, thereby notifying the conductor that she desired to leave the car at that point, and he transmitted this signal to the motorman. ~~Appellant~~ Plaintiff then left her seat, went through the exit door and stepped down on to the platform. The undisputed evidence shows that when she did this, the outside door was closed. While she was standing there and just as the car reached Second Avenue, its speed being slackened, two men came out of the body of the car, pushed by the ~~appellant~~ Plaintiff, opened the exit door and stepped down onto the street. At that time the conductor called out a warning to ~~appellant~~ Plaintiff that she ~~could~~ should wait until the car stopped before alighting, but she either did not hear him or paid no attention to him, and passed out directly after the two men, stepping off of the step and falling on to the street. ~~Appellant was picked up by the conductor and one of the passengers, and was taken to a neighboring house.~~ It ~~is~~ was apparent from the evidence and from a plat of the back platform of this car, introduced in evidence, that as ~~appellant~~ Plaintiff stood on this platform after the door had been opened by the two men in question, her presence prevented the conductor from closing the exit door, and that her departure from the car was so sudden that the conductor had no opportunity to do anything to prevent her from leaving the car, except to call out a warning to her, as he did. ~~Appellant~~ Plaintiff admitted in her testimony that when she left her seat, after giving the signal to stop, she knew the car was still in motion, ~~and it seems clear to us that an ordinarily~~ intelligent person, in the exercise of due care for his own safety, could easily judge by the street and store lights, whether or not the car was in motion. It is apparent to us that, after the two men left the car, appellant followed without taking hold of

~~any side rail or paying any attention to whether or not the car was still moving.~~ When ~~appellant~~ plaintiff stepped down from the main body of the car to the platform, the exit door was closed and there be nothing in the evidence to show that the conductor knew, or should have known, that any one other than ~~appellant~~ plaintiff intended to leave the car at this point. ~~It is evident that the conductor warned appellant as soon as he discovered that the car door was open; and the fact that appellant did not hear his warning or paid no attention can not be considered negligence on his part.~~ Witnesses for ~~appellee~~ defendant, not connected in any way with the company, heard the conductor's warning and knew that the car was moving at the time. ~~As appellee says in its brief, if appellant did not hear the conductor's warning, it was either because her hearing was not as good as that of numerous other persons on the car or because she was not paying attention to her surroundings. In the latter case, she was negligent; in the former case, the conductor was not negligent.~~

We do not find any evidence in the record that would justify us in holding that the appellee was negligent in its operation of this street car, while there is considerable evidence to show that appellant was negligent. The judgment is therefore affirmed,

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 1186

R H Dun Apr. 6/16

BE IT REMEMBERED, that afterwards, to-wit: on FEB 1 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6147.

James M. Swan, Deft. in error.

vs Error to Kendall.

William K. Loofbourrow, Pltf. in error.

Dibell, P. J.

Swan sued Loofbourrow in the circuit court of Kendall County and filed a declaration and had a summons issued to the sheriff which was returned served, and on October 28, 1914, at the October Term had a default and a judgment for $676.71. On November 9, 1914, at said term, the defendant appeared by attorney and entered a motion to set aside the default. On March 6, 1915, still at said October Term, he entered his motion to withdraw the motion to set aside the default and this latter motion was granted. He says that he afterwards, on March 18, 1915, at said October Term, entered another motion to set aside said default on affidavit, and that motion was denied. He thereupon obtained a bill of exceptions concerning said motions and now prosecutes a writ of error from the order refusing to vacate the default.

The bill of exceptions does not show upon what ground the first motion was based. It obviously was never heard but was withdrawn. The second motion, assuming one was made, as to which the bill of exceptions is silent, was based on an affidavit of meritorious defense. The declaration was upon two notes for different sums, one described in the first count and the other in the second count of the declaration. The affidavit related to "this note" without showing whether the first or second note declared on was meant and it alleged that that note was given in compliance with a contract for the exchange of lands. It did not state with whom this contract was made nor any of the terms of the contract. It stated that James M. Swan did not comply with his part of the contract, and because of his failure to do so Loofbourrow had not received any consideration "for the above mentioned note," and

Sec. 2c. 1917.

James M. Swan, Defd. in error.

vs

Error to Kentucky.

William T. Lockbourrow, Plff. in error.

Dibell, P. J.

Swan had Lockbourrow in the circuit court of Kenton County, and filed a declaration and had a summons issued to the sheriff which was returned served, and on October 22, 1913, at the October Term had a default and a judgment for $275.71. On November 8, 1913, it said term, by determined upon motion by attorney and entered a motion to set aside the default. On March 6, 1915, still at said October Term, he entered his motion to withdraw the motion to set aside the default and this latter motion was granted. At the next succeeding, on March 15, 1915, at said October Term, he entered another motion to set aside said default on affidavit, and this motion was denied. On thereupon obtained a bill of exceptions containing said motions and now prosecutes a writ of error. The error relied on relates to these motions.

The bill of exceptions sets forth [illegible] the [illegible] claim which was based. It [illegible] [illegible] and was [illegible] shown. The second motion, regarding one was made, on to which the bill of exceptions is silent, was based upon an affidavit of [illegible] [illegible]. The indemnification was given two notes for $1 [illegible] shown, one described in the first count and the other in the second count of the declaration. The affidavit relating to "that notes" statement showing whether the first or second note mentioned on the [illegible] was meant and it alleged that both was given in consideration [illegible] a contract for the exchange of lands. It has not been [illegible] this contract was made nor what of the terms of the contract. It also [illegible] James M. Swan has not complied with his part of the contract, and because of this failure it is so Lockbourrow has not received any consideration for the above [illegible]

that he denies that he is indebted to Swan in any amount. The affidavit did not show what Swan was required to do by the contract nor in what respect he failed to comply therewith. It stated only the legal conclusion of the affiant and no facts by which the court could determine whether his conclusion was well founded or not. This affidavit is entirely insufficient to show that he had any defense to either note and it practically admits that he has no defense to one of the notes. The facts should have been stated so that the court could determine whether he had any defense. The affidavit further said that Swan was indebted to the affiant in the sum of $2000 but it did not say how the indebtedness arose nor what the facts are, and it stated but a conclusion and is insufficient. Moreover, as a general rule, a default will not be vacated merely to let in a set off, for the defendant has a perfect remedy by bringing suit against the plaintiff upon such set off. The court didnot err in denying a motion to set aside the default.

In this court Loofbourrow claims that there is a defect in the return of the sheriff upon the summons. So far as appears from the bill of exceptions this point was never made in the court below. By the motions above recited he entered a full appearance in the case, and he cannot be heard in this court to urge a reason for vacating the default which he did not present to the court below.

The order is therefore affirmed.

[illegible] he knows that he is liable to [illegible] on any [illegible]. The affidavit did not show that [illegible] required [illegible] to do by the contract nor in what respect he failed to comply therewith. It stated only the legal conclusion of the plaintiff and no facts upon which the court could determine whether his conclusions are well founded or not. This affidavit is substantially insufficient to show that he had any defense to either note and it particularly states that he has no defense to one of the notes. The facts should have been stated so that the court could determine whether he had any defense. The affidavit further avid that Evans was indebted to the plaintiff in the sum of $2000 but it did not say that the indebtedness arose out of the notes sue, and it stated that a counterclaim was in [illegible]. However, as a general rule, a [illegible] will not be vacated merely to let in a set off, or [illegible] unless he [illegible] by bringing suit against the plaintiff upon such set off. The court [illegible] in [illegible] a motion to set aside the default judgment.

In this court Lodbonnson [illegible] where is a subject to the return of the [illegible] upon the summons. So far as a trial [illegible] bill of exceptions this point has never been in the court [illegible]. By the motions above [illegible] assumed a full [illegible] in the case, and [illegible] cannot be found in this court to [illegible] a reason for vacating the [illegible] default [illegible] to the [illegible] judgment.

The [illegible] is [illegible].

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this day of_____in the year of our Lord one thousand nine hundred and_____

Clerk of the Appellate Court.

K165

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 118

N H Dec Opin 6/16

BE IT REMEMBERED, that afterwards, to-wit: on FEB 6 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6165.

W. D. Chemical Co. appellant.

vs Appeal from Peoria.

Walter ~~Teel~~ Teel, appellee.

Dibell, P. J.

By a printed and written contract, dated July 29, 1913 the W. D. Chemical Company sold and Walter T. Teel bought 6,000 pounds of hog and cattle powders for $[illegible].00. On June 18, 1914 said company sued Teel in the Peoria circuit court upon said contract for the payment of said $[illegible], [illegible] assumpsit upon the contract with the common counts added, and Teel pleaded the general issue and certain special pleas. On a jury trial, at the close of all the proofs, the court instructed the jury to find a verdict for defendant, and such verdict was returned, a motion for a new trial was denied, and defendant had judgment, from which plaintiff prosecutes this appeal.

It appeared from plaintiff's proofs upon the trial that defendant, at the same time that he signed the contract in question also signed and delivered to the company his promissory note for $680, the price of said medicines, and that thereafter and before this suit was brought, the company sold and assigned said note to one R. F. Zehr and when this suit was brought on June 18, 1914, Zehr was still the owner of said note. It is a recognized rule [illegible] that the [illegible] of the note of the debtor for a pre-existing debt is not payment, unless it is expressly agreed to take the note as payment, or unless the creditor parts with the note or is guilty of laches in its presentation for payment. THAT [illegible] v Barber, 5 Johns, 88. This was [illegible] Stone and Gravel Co. v Gates Iron Works, 144 Ill. [illegible] was recognized and applied by this court in Kerdusk [illegible] v Hummer, 49 Ill. App. 588. On principle it must be that when plaintiff sold and assigned this notem, it did not retain a

cause ofaction against defendant for the purchase price of the merchandise, and if that position could be maintained, the vendee of the goods could be subjected at the same time to two actions by different persons to recover the same debt. We hold that when plaintiff sold and transferred this note to Zehr, it did not retain a cause of action against Teel for the merchandise. That note was outstanding in the hands of Zehr when this suit was begun and therefore plaintiff then had no cause of action to recover for the selling price of the goods, and the court properly directed a verdict. Moreover the president and the general manager of the plaintiff testified that the company took this note as payment for said goods, and this was not disputed in any way, and this appears to bring this case within the other branch of the rule above stated.

Zehr sued Teel upon this note and upon another note in the county court of Peoria County, and that suit was pending and on trial when this suit was begun. In that suit Teel pleaded the general issue and that the signature to the note was not his signature and another special plea. On that trial Teel had a verdict as to this note, finding no cause of action. Appellant here assumes that that was a finding that the signature to the note was a forgery and therefore argues here that as that note was a forgery, the original cause of action remained in plaintiff. There is no evidence here that the jury in the Zehr case found that this note was a forgery and hence the argument on that subject is not well founded. If the only issue had been whether the note was a forgery, there would be force in plaintiff's argument, but Teel also pleaded the general issue to Zehr's declaration upon this note. Under that plea he could have proved payment. It appears ~~have~~ that Teel only received 3,000 pounds of the 6,000 pounds which he purchased. If he proved that Zehr was a purchaser [illegible] the note after maturity, he could [illegible]

shown a complete failure of consideration by showing that the merchandise was worthless or was not what it was represented to be and that he ascertained that fact and delivered or offered it back to the company. He could have proved other defenses under the general issue. No proof was introduced from which the jury could know what particular defense it was which was sustained in the county court in to it this note. Therefore there is no proof here that this note was found to be a forgery. The proof in this case is that Teel did not sign the note. The fact that he filed a plea that it was not his signature does not make it a forgery. Even if Teel testified on the trial of the Zehr case that his name to that note was not his signature and not by his authority, still there may have been many other witnesses to prove that it was his signature, and the jury may have so found but may have sustained some other defense presented by him. Plaintiff after a fashion sought to inquire of two witnesses what Teel testified in the county court as to the validity or invalidity of this note, but he did not make any offer to show what he expected the answer to be, as required by the rule laid down in Ittner Brick Company v Ashby, 198 Ill. 562 and Court of Honor v Dinger, 123 Ill. App. 406, and if that rule is modified by what is said in Hartnett v Boston Store, 265 Ill. 331, yet any answer that could have been made to these questions, unaccompanied by any proof of what other witnesses testified in the Zehr case on that subject, would not have been material here, where the question if material at all, was on what ground was Zehr defeated in the suit on this note, and that is not disclosed at all by the proofs.

The judgment is therefore affirmed.

Niehaus, J. took no part.

[illegible]

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 119

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 3 1916

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6167

June E. Mills, appellee

vs Appeal from Henderson.

Village of Oquawka, appellant.

Dibell, P. J.

On May16, 1914, the husband of June E. Mills occupied a part of the Graham Building in the Village of Oquawka, in Henderson County, as a bakery. There was a brick sidewalk, ten or twelve feet wide, in front of this building and at one time there had evidently been a stairway leading from this sidewalk down to a cellar underneath, but its use for such a purpose had been abandoned many years before the date named, the stairs had been removed, and the opening ~~at~~ in that sidewalk, leading to the stairs, had been covered with the wooden door. On the evening of the day in question a wheelbarrow was standing on this wooden door, having been left there by Mills, as he intended to use it during the night for the purpose of transferring bread to the depot for shipment on an early morning train. Between seven and eight o'clock that evening several persons were sitting on that wheelbarrow, when the wooden door gave way and they were all precipitated into the cellar. The evidence shows that June E. Mills, who was one of those thrown into the cellar, was quite seriously injured. She was at the time in a delicate condition, and about three weeks later suffered a miscarriage. She brought suit against the Village because of her said injuries and upon a jury trial received a verdict of [illegible],000. A motion for a trial was overruled and plaintiff had a judgment for that amount, from which the defendant below appeals, arguing here that appellee was guilty of contributory negligence, that the village was not negligent, that the damages are excessive and that the court below erred in its rulings on the evidence and the instructions.

Jan. 24, 1947

Jane E. Willis, Appellee

vs. Appeal from Jefferson.

Village of Ogdensburg, Appellant.

Ellis, P. J.

On May 13, 1944, the husband of Jane E. Willis occupied a part of the Graham Building in the Village of Ogdensburg, in Jefferson County, as a bakery. There was a drain underneath, ten or twelve feet wide, in front of this building and at one time that had evidently been a archway leading from this alleyway to a cellar underneath, but its use for such a purpose had been abandoned many years before the date named, the plaster had fallen therefrom, and the opening on in that sidewalk, leading to the cellar, had been covered with the wooden door. On the evening of the date named, having been left there by mistake, as he intended to use it during the night for the purpose of transferring bread to the cars for shipment on an early morning train. Between seven and eight o'clock that evening Jane E. Willis was walking on the sidewalk in front of the building, when she fell through the door and precipitated into the cellar. The evidence shows that Jane E. Willis, who was one of those thrown into the cellar, was quite seriously injured. She was at the time in a pregnant condition, and about three weeks later suffered a miscarriage. She brought suit against the Village because of her said injuries and from a jury trial received a verdict for $2,000. A motion for a new trial was overruled and plaintiff has a judgment for that amount. Upon which the defendant takes appeal, arguing that plaintiff was guilty of contributory negligence, that the village was not negligent, that the damages are excessive and that a motion erred in its rulings on the evidence and its instructions.

The evidence clearly shows that the wooden door or board cover which fell in, and the supports underneath it were rotten and had been in such a condition for a long space of time. At least two years before this accident, a member of the village board put the end of his cane through a rotten hole in one of the planks composing this wooden cover, and in spite of his knowledge of the condition of this part of the public sidewalk he testified that to his knowledge the place had never been repaired while he was on the Board nor up to the time of the accident. Other witnesses testified to an entire lack of repairs on this place for nineteen years or longer. Certain pieces of timber were admitted in evidence and identified by at least one witness as being part of the supports of this wooden cover. These timbers were rotten. Appellant claims that they were not sufficiently identified and should not have been admitted, but we consider that a sufficient identification was made. Other evidence was introduced to show that ~~xxxx~~ this wooden portion of the walk was in an unsafe condition for public travel. The evidence further showed that the City had been notified of the condition of this walk by complaint ~~xxxxxxxxxx~~ to the mayor ~~xx~~ or president of the village board with a request from ~~appellee~~ plaintiff that the walk or that portion of it be condemned and removed. This complaint was ignored, apparently without any investigation of the part of the village officials. Under the principles laid down in Sherwin v City of Aurora, 357 Ill. 458, the jury were warranted in finding from the evidence that in this case the duty was laid on the city, not merely of ~~xxxxxxxxx~~ inspection of the sidewalk, but also of inspecting the supports underneath the sidewalk to ascertain whether or not they were sufficient. It is evident that this was not done or even attempted. We consider that the jury were warranted in finding that the evidence shows the village to have been guilty of negligence, as charged in the amended declaration.

It is claimed that appellee was guilty of negligence, in that her complaint to the mayor regarding the sidewalk showed that she was cognizant of its condition and that, in sitting or being on this rotten portion of the walk, she was not in the exercise of due care for her own safety. It appears from the evidence that her complaint only related to the surface of the walk and that she was completely ignorant of the conditions existing underneath that surface. We do not feel that the duty could be laid upon her to ascertain the condition of the supports of this sidewalk and do not think there was such evidence presented to the jury that it should have found appellee had such notice of the defect that she was guilty of contributory negligence.

Complaint is made by appellant of the action of the court in refusing certain instructions requested by it and also in giving certain other instructions at the request of appellee, but after considering all the given instructions as a series, we do not feel that any such error exists. It is true that certain given instructions cast upon the Village the absolute duty of keeping its sidewalks in repair, while a better statement of the law would have been that the duty of the village was to use reasonable care to keep its sidewalks in reasonably safe condition for public travel thereon, but one instruction given at the request of appellant and one requested by it and refused contained [illegible] statement of the law as the instructions complained of, and we do not feel that appellant is entitled to complain of that feature of the given instructions. Appellant complains of the refusal of one of its requested instructions, which told the jury in brief, that if they believed from the evidence that this portion of the sidewalk broke because six people were upon it, then there could be no recovery. We do not consider that this instruction was correct as applied to the facts. These six people were not piled, one upon top of another, on one portion of this

sidewalk, but each were standing, or sitting or being supported by, a distinct portion of the walk, and the sidewalk ought to be in such a condition that if people stood upon each portion thereof they would be supported.

Complaint is made that the damages awarded were excessive. There seems to be no question but that appellee was injured by her fall. She complained of an injury to her arm and neck and she suffered a miscarriage shortly after the accident. She was under the care of two physicians for a considerable time after the accident and, while appellant claims that her miscarriage was not due to the accident, still the surrounding circumstances, as shown by the evidence, are such that we believe the jury justified in considering it due to the shock she received. In view of her injuries, we do not feel that the amount awarded was so great as to warrant us in disturbing the conclusion of the jury on that point.

We find no reversible error in the record and the judgment is therefore affirmed.

Affirmed.

already, but much more shocking, on sitting or lying momentarily, a distinct portion of the walk, and the sidewalk ought to be in such a condition that it would stand upon such portion thereof they would be supported.

Complaints made after the damages described were excessive. There seems to be no question but that damages are injurious to her health. The complaints of an injury to her arm and back are sufficient to warrant monetary relief in assessing. The evidence under the care of two physicians for a considerable time after the accident and could experience (illegible) right-ness was not due to the accident, still the amount of circumstances, as shown by the evidence, are such that we believe the jury justified in considering it due to the shock she received. In view of her injuries, we do not feel that the amount awarded was so great as to warrant us in disturbing the conclusion of the jury on that point.

We find no reversible error in the record and the judgment is therefore affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this day of_____in the year of our Lord one thousand nine hundred and_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 136

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6191

Frances Mertel, Deft. in error.

vs Error to LaSalle.

Charles F. Walter, Pltf. in error.

Dibell, P. J.

Frances Mertel (formerly Sauter) sued Charles F. Walter to recover $350.00 which she paid him to bind a real estate bargain, which was finally abandoned. At the close of the evidence the court directed the jury to return a verdict for her for $350 and such a verdict was returned, a motion for a new trial was denied and plaintiff had judgment, and this writ of error is brought to review that judgment.

Walter lived at Cedar Rapids, Iowa, and owned two adjoining lots and a dwelling upon one of them in Peru, Illinois, and the same was in possession of a tenant, named Strack, and Walter had the right to terminate the tenancy by October 1, 1914. Walter had upon said premises a sign that they were for sale. Frances Sauter was about to marry J. A. Mertel and desired to purchase a place. The negotiations were all by letter, ~~and the only question is whether the minds of the parties ever met upon all the terms of a valid contract.~~ All the letters were preserved and were in evidence, except that Walter testified in sending one letter which Mrs. Mertel testified she did not receive. ~~It is argued in her behalf that the court might well~~ find from the evidence that no such letter was sent. The question whether such a letter was sent was one of fact for the jury. ~~The court could not decide that question.~~ We will assume that such a letter was sent or else the judgment must be reversed for failure to submit that question to the jury. We shall assume that such a letter was sent. Whether these letters constituted a complete contract was a question to be determined by the court. Telluride Power T. Co. v Crane Co.

Sup. Ct. 1112.

Frances Mertel, Ct. [illegible].

vs. Error to Defeit.

Charles T. Walter, Plff. in error.

[illegible], C. J.

Frances Mertel (formerly Sauter) sued Charles T. Walter to recover $250.00 which she paid him to induce a state bargain, which was finally abandoned. At the close of the evidence the court directed the jury to return a verdict for her for $250 and such a verdict was returned, a motion for a new trial was denied and plaintiff had judgment, and this writ of error is brought to review that judgment.

Walter lived at Cedar Rapids, Iowa, and owned two adjoining lots and a dwelling upon one of them in Peru, Illinois, and the same was in possession of a tenant, named Strunk, and Walter had the right to terminate the tenancy by October 1, 1914. Walter had upon said premises a sign that they were "for sale." Frances Sauter was about to marry J. A. Mertel and desired to purchase a place. The negotiations were all by letter and the only question is whether the minds of the parties ever met upon all the terms of a valid contract. All the letters were preserved and were in evidence, except that Walter testified he sending one letter which Mrs. Mertel testified she did not receive. [illegible]

[illegible] question whether such a letter was sent was one of fact for the jury. The court could not decide that question. Hence, we must assume that such a letter was sent or else the judgment must be reversed for failure to submit that question to the jury. We shall assume that such a letter was sent. Whether these letters constituted a binding contract was a question to be

~

~~Ill. 213.~~

Mertel began the negotiations by a letter, dated March 7, 1914, addressed to Walter, wherein he told Walter that he passed by his place that day with a friend and saw the sign upon it and he thought that friend appeared to be a prosperous buyer, and he asked for lowest price and particulars. Under date of March 13, 1914, Walter replied to Mertel by a letter containing the following among other things:

"I want $4500.00 for the whole place, or $3500.00 for house and one lot, the fruit and berries are all on that one lot, you see Mr. Strack and ask him to let you show your man the house, he has rented the place for one year, but if I sell he must move bb Oct. 1st. 1914, or if your party wants it sooner, I guess I can arrange that with Mr. Strack.

I will take $500.00 or all I can get cash down and balance to suit buyer, at 5 per cent. I will want $250.00 to bind the bargain. I will give you $50.00 if you make the deal. You know the place, and can tell him all about it, there is hot water, furnace, bath and toilet, sewerage all in, cupboards and sinks built in, also china closet; get him interested and show him the place, and then he can see what there is there, let me know what you make out as soon as possible."

Under date of March 18 Mertel answered in part as follows:

We finally got to see the house last night and we thought it was just what we wanted, but don't you think you could give us a little lower price. If we bought the wholeplace and paid spot cash we would like to occupy it by May 1st."

Walter replied to Mertel under date of March 19 in part as follows:

"I can't sell it any cheaper than I priced it to you. I

[illegible]

Martel began the negotiations by a letter, dated March 7, 1914, addressed to Walter, wherein he told Walter that he passed by his place that day with [illegible] and saw the sign upon it and he thought that Walter appeared to be a prosperous buyer, and he asked for lowest price and particulars. Under date of March 13, 1914, Walter replied to Martel by a letter containing the following among other things:

"I want $4500.00 for the whole place, or $3500.00 for house and one lot, the grain and garden are all on that one lot, you see Mr. Ternck and men him to let you know your man the house, he has rented the place for one year, but if I sell he must move by Oct. 1st. 1914, so if you really wants it sooner, I guess I can arrange that with Mr. Ternck.

[illegible] to suit buyer, at 5 per cent. I will [illegible] $4500.00 to close the bargain. I will give you $[illegible].00 if you make the deal. You know the place, and can tell him all about it, there is hot water, furnace, bath and toilet, sewerage all in, cupboards and china built in, two china closets; get him interested and show him the place, and then he can see what there is there, let us know what you make out as soon as possible."

Under date of March 18 Martel answered in part as follows:

"I finally got to see the house last night and we thought it was just what we wanted, but don't you think you could give us a little lower price. If we bought the [illegible] and [illegible] we would like to answer it by Tuesday."

Walter replied to Martel under date of March 18 in part as follows:

"I don't sell it any cheaper than I placed it to you. I

paid $4,500.00 and can't loose on it. I don't know whether Strack will move or not, he might ask so much. I don't care about the cash money. I would just as soon have a good piece of land that will increase in value."

Mertel replied in part as follows under date of March 33:

"Inclosed herewith please find bank draft for $350.00 to bind the bargain by Frances G. Sauter for the entire place, trusting this will be satisfactory and you will proceed with the proper papers. Kindly take up the matter with Mr. Strack we would like to occupy by May 1st. 1914."

Walter replied to Mertel as follows under date of March 35:

"Dear Sir: I have your letter and bank draft of the 33rd. but will not bind the sale until I hear from Mr. Strack. If he asks too big a price to vacate by May 1st. 1914, I will not sell only subject to the terms of his lease, giving him until Oct. 1st. 1914 to vacate. If his price is more than I care to pay, may be xxxx you and I can arrange some satisfactory way to buy the lease. You may let me know what you think about this plan. I will keep your name in privacy at present and probably I can get him to vacate at my price. There is furniture stored upstairs in the house that will have to be left there until fall. The party buying the property will also have to buy the window shades which are in good condition. The price will be $10.00 for the shades. If I can arrange with Mr. Strack I will have the necessary papers drawn up immediately."

~~It will be observed that Walter here introduced the new condition.~~ He required that the furniture stored upstairs should be left there till fall and that the purchaser must buy the window shades and ~~pay $10.00 therefor~~. Miss. Sauter then wrote Walter in part as follows, under date of March 30:

paid $4,500.00 and can't hope on it. I don't know whether Strauch will move or not, he might ask so much. I don't care about the cash money. I would just as soon have a good piece of land that will increase in value."

Martel replied in part as follows under date of March 25:

"Inclosed herewith please find bank draft for $250.00 to pay the bargain by Frances G. Sauber for the entire place, trusting this will be satisfactory and you will proceed with the proper papers. Kindly take up the matter with Mr. Strauch we would like to occupy by May 1st. 1914."

Miller replied to Martel as follows under date of March 25:

"Dear Sir: I have your letter and bank draft of the 23rd. but will not bind the sale until I hear from Mr. Strauch. If he asks too big a price to vacate by May 1st. 1914, I will not sell only subject to the terms of his lease, giving him until Oct. 1st. 1914 to vacate. If his price is more than I can to pay, may be with you and I can arrange some satisfactory way to buy the lease. You may let me know what you think about this plan. I will keep your name in reserve at present and probably I can get him to vacate at my price. There is furniture stored upstairs in the house that will have to be left there until fall. The party buying the property will also have to buy the window shades which are in good condition. The price will be $10.00 for the shades. If I can arrange with Mr. Strauch I will have the necessary papers drawn up immediately."

It will be observed that Miller here introduced the new idea that the furniture stored upstairs should be left in the house until fall and that the purchaser must buy the window shades for $10.00 therefor. Miss. Sauber then wrote Miller in answer as follows, under date of March 30:

"I note by the letters you have sent that you are not trying very hard to accomodate me with the house by May 1st. Now if you do not care to make this deal, we will pass it up and you may return the $250.00 or if we can arrange a satisfactory deal I shall want the whole place, insurance papers, tax receipts and all other proper papers including lease so I may collect rent, all for $4500.00 the shades are of no benefit to me as I want new things to begin with."

It will be observed that when Walter received the $250 he refused to bind the bargain by it and that in the letter just quoted Miss. Stauter calls for the return of the $250. On March 31 Walter replied as follows:

"I have your letter of the 30th. inst., and am enclosing letter from Mr. Strack, whereby you can see that it is impossible for me to get him out by May 1st. but if you will buy the place. let him hold the lease until October I will be there by Saturday of this week to close the bargain, or as soon as I hear from you.

I understood by your former letters, that you would not buy the place unless you could take possession by May 1st. but by your last letter, I understand that you will buy the place immediately if we could make a satisfactory deal, that is I will turn the lease and papers over to you dating from April 1st.

I will hold the draft for $250.00 until I hear from you or have a verbal conferance with you."

The letter from Strack which Walter enclosed therewith showed that his wife was in a hospital and that he was not permitted to discuss with her the question of giving up the lease, and that he therewith remitted the rent for April. On April 3 Miss. Stauber replied as follows:

"I note by the letters you have sent that you are not trying very hard to accomodate me with the house by May 1st. Nowadays you do not care to make this deal, we will pass it up and you may return the $250.00 or if we can arrange a satisfactory deal I shall [illegible] the March place, [illegible] the receipts and all other proper papers including lease so I may collect rent; all for $4800.00 the shades are of no benefit to me as I want new things to begin with."

In [illegible] he [illegible] the [illegible] I [illegible] a bind the message by it and that in the letter just quoted Miss. Sauter [illegible] the return of the $250. On March 31 Walter replied as follows:

"I have your letter of the 30th. inst., and am enclosing letter from Mr. Strunk, whereby you can see that it is impossible for me to get him out by May 1st. but if you will buy the place. let him hold the lease until October I will be there by Saturday of this week to close the bargain, or as soon as I hear from you.

I understood by your former letters, that you would not buy the place unless you could take possession by May 1st. but by your last letter, I understand that you will buy the place immediately if we could make a satisfactory deal; that is I will turn the lease and square over to you dating from April 1st.

I will hold the draft for $250.00 until I hear from you or make a final [illegible]."

The letter from Miss Sauter [illegible] [illegible] his wife was in a hospital and that he was not interested in [illegible] the question of giving up the lease, and that he therefore [illegible] the draft for April. On April 3 Miss. Sauter replied as follows:

"I recd your letter of March 31st. and as the offer is favorable I wish to close the deal on next week Thursday or Saturday which ever time is convenient for you to come. You may write me when you will be here or call Joe Mertel when you reach town and I will come down town with him."

~~That letter did not treat the deal as closed but expressed a wish~~ for him to come to Peru and to close the deal on Thursday or Saturday of the following week. It will be observed that he had said that she would have to buy the window shades and pay $10 therefor and she had refused that condition and he had not withdrawn it. He had imposed the condition that furniture should remain in the house till fall and she had not answered that and she had told him that she should want insurance papers, tax receipts and all other proper papers, including the lease and he had not answered that, except as to the lease, and that he was waiting ~~for a verbal conference with her.~~ Walter testified that he wrote her a letter dated April 2, saying that as long as she was satisfied to take the place he would be in Peru the next Saturday to close the deal, though he did not remember exactly what he wrote. She wrote Walter as follows under date of April 4:

"I wrote you on the 2d.inst that your offer seemed favorable and I would like to close the deal; but yesterday I was given a much more liberal offer, and would appreciate if you would consider with me. I was given permission to remain on the same place after Oct. 1st. which I will occupy till then; in fact I hardly think I could arrange to move then, and as the rent from this place doesn't near cover interest, taxes and insurance I would much prefer to not close this deal at all now. If in the future I desire the place (which would mean much more expense and inconvenience to me than my present offer) I would be very glad to make a bargain then, trusting you will let me know at your earliest convenience

"I read your letter of March 21st. And as the offer is favorable I wish to close the deal on next week Thursday or Saturday which ever time is convenient for you to come. You may write me when you will be here or call Joe Marshal when you reach town and I will come down town with him."

Upon receipt of this letter I wrote at once to Joe Marshal to come to Fern and to close the deal on Thursday or Saturday of the following week. It will be observed that he had said that she would have to buy the window screens and my bill therefor and she had refused that condition and he had not withdrawn it. He had imposed the condition that furniture should remain in the house till fall and she had not answered that and she had told him that she should want insurance papers, tax receipts and the other abstract papers, including the lease and he had not answered that, referring to the lease, and that he was satisfied to close the deal, though he did not remember exactly what he wrote.

She wrote Walter as follows under date of April 4:

"I wrote you on the 24.inst that your offer seemed favorable and I would like to close the deal but (although I was given a much more liberal option, and would appreciate if you would consider with me. I was given permission to remain on the same place after Oct. 1st. When I will convey (?) them; in fact I hardly think I could arrange to move then, and the 20th seems too late (soon) to take care of (?) taxes and insurance I would much prefer to not close this deal at all now. If in the future I leave the place (which I would even more regret and inconvenience (?) as I can by present offer) I would be very glad to make a reasonable time,

if this is satisfactory to you and if you would be kind enough to return the $250.00."

~~This was a withdrawal from the negotiations and she had a right to~~ withdraw unless all the terms of a binding contract had been ar- ~~ranged.~~ Under date of April 6, he replied to her that she must stick to her agreement or lose what she had paid down. He therein told her what insurance he had on the house and when the policy expired and offered to turn the insurance over to her without charge, this being the first time that he had replied to her request that the insurance papers should be turned over to her. He also stated that he had an abstract which he would give her and that he would be at a certain office in Peru on Saturday April 11. He did appear at that office at that time and Miss. Sauter did not appear. It seems entirely clear to us from a consideration of the foregoing correspondence that at no time did each partyagree to all the terms of the other. Miss. Sauter refused to pay extra for the window shades and Walter did not withdraw the demand that she should. Miss. Sauter demanded the insurance papers and Walter did not offer to comply with that requirement until after she had withdrawn from the negotiations. His request that she should allow certain furniture to remain stored in the building had never been accepted by her. She requested the tax receipts and he never offered to deliver the receipts to her. She requested other [illegible] papers and what those papers were had not been determined. It is evident that it was intended to endeavor to effect an agreement on these various matters when he came to Peru and had a verbal conference with her. There had been no discussion or agreement as to the form of the deed. Walter had received the rent for April and there had been no agreement whether he should retain it or should pay it to Miss. Sauter. It is our conclusion that the minds of

if this is satisfactory to you and if you would be kind enough to return the $380.00."

This was a release from the negotiation and the [illegible] which all the terms of a binding contract had been arranged. Under date of April 8, he replied to her that she must adhere to her agreement or lose what she had paid down. He thereafter told her what insurance he had on the house and when the policy expired and offered to turn the insurance over to her without charge, this being the first time that he had replied to her request that the insurance papers should be turned over to her. He also stated that he had an contract which he would give her and that he would be at a certain office in Penn on Saturday April 11. He did appear at that office at that time and Miss. Sauter did not appear. It seems entirely clear to us from a consideration of the correspondence that at no time did each performance to all the terms of the other. Miss. Sauter refused to pay extra for the window shades and Walter did not withdraw the demand that she should. Miss. Sauter demanded the insurance papers and Walter did not offer to comply with that requirement until after she had withdrawn from the negotiations. His request that she should allow certain furniture to remain stored in the building had never been accepted by her. She requested the ten receipts and he never offered to deliver the receipts to her. She requested other insurance papers and not those papers were had not been determined. It is evident that it was intended to answer in effect an agreement on these matters before when he came to Penn and had a verbal conference with her. There had been no discussion or agreement as to the [illegible] there had been an agreement which is usually relying it [illegible] may be to other. Rather, it is our conclusion that the [illegible]

the parties never met on all the terms of a contract. Corcoran v White, 117 Ill. 118; Middaugh v Stough 161 Ill. 312; Scott v Fowler 237 Ill. 104.

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 149

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6211

P. J. Millett, Deft in error

vs Error to Kane.

D. J. McDonald, Pltf in error.

Dibell, P. J.

D. J. Millett owns a farm near Paris, Kentucky, where he lived and he ~~Tarts~~ contracts for railroad construction work in various parts of the United States. D. J. McDonald owns a farm near Aurora Illinois where he lives, and he ~~did~~ like work in various parts of the United States. The parties had known each other for years, and during the time covered by the transactions here involved were in various parts of the South. ~~On April 16, 1914, Millett brought this suit against McDonald on three lost promissory notes one for $1,000, dated May 10, 1909, one for $1,000 dated June 30 1909 and one for $1,300.00 dated August 24, 1909, each due on demand with interest at six per cent per annum.~~ He filed a special count on each of the notes and the consolidated common counts. McDonald filed numerous pleas, the general issue, a denial of signature, set off, releases, payment, accord and satisfaction, lack of consideration, and that thenotes were given in a partnership transaction between the parties, the accounts of which had not been closed. ~~Upon a jury trial there was a verdict for~~ plaintiff for $4,083. On February 18, 1915, and on April 13, 1915 after motions for a new trial and in arrest of judgment had been overruled, plaintiff had a judgment for $4,117, being on verdict with legal interest thereon from its rendition. This is a writ of error brought by McDonald to review said judgment.

The special counts on the notes did not state that they were payable at any particular place. In cross-examination of Millett, he stated that the notes were payable at Johnson City, Tennessee. He did not seek to amend the special counts of the declaration, so as to correctly describe the notes. ~~There~~

Den. No. 8021

P. C. Millett, Both in error

vs. Error to Kane.

D. J. McDonald, Plff in error.

Dibell, P. J.

E. J. Millett owns a farm near Tyrie, Kansas, where he lives and he [illegible] contracts for railroad construction work in various parts of the United States. D. J. McDonald owns a farm near Tucson, Arizona where he lives, and he does like work in various parts of the United States. The parties had known each other for years, and during the time covered by the transactions here involved [illegible] in various parts of the South. On [illegible] McDonald [illegible] $1,000, dated May [illegible] $1,000 [illegible] $1,000, each [illegible] interest at 6½ per cent per annum. No [illegible] a special count on each of the notes and the consolidated common counts. McDonald filed numerous pleas, the eye general i nue, a denial of signature, set off, release, payment, accord and satisfaction, lack of consideration, and that the notes were given in a contraveniy transaction between the parties, the accounts of which had not been closed. [illegible] plaintiff for $1,000. On February 20, 1913, and on April 12, 1913 after motions for [illegible] and in arrest of judgment had been overruled, plaintiff had a judgment for $1,117, going the verdict with legal interest thereon from its rendition. This is a writ of error brought by McDonald to reverse said judgment.

The special counts on the notes did not allege that they were payable at any particular place. On proof introduction of [illegible], he stated that the notes were payable at Johnson City, Tennessee. He did not seek to prove the special counts

was ~~x~~ therefore a variance between the three special counts and the three notes proven, and there could be no recovery under said special counts, and McDonald was entitled to have given three instructions which he asked, directing a verdict against plaintiff as to the first, second and third counts of the declaration. But Millett proved the existence of the notes, the signature of McDonald thereto, his payment to McDonald of the principal sums named in said notes and that he lost the notes after maturity. He was therefore entitled to recover under the common counts, if said defenses hereinafter referred to were not established; and McDonald was not harmed by the refusal of the court to give said three instructions. McDonald admitted asking for and receiving the three sums of money; and the three checks upon which they were paid were in evidence bearing his endorsement; and he admitted giving memorandum showing his receipt of those several sums. He claimed to doubt whether he gave notes for them, but letters from him in evidence ~~clear conclusively~~ indicated that he did send a note for each of said sums. He did not claim to have paid them. ~~The object of the common counts in such a suit is to protect a plaintiff against some accidental variance in the description of notes sued on.~~

McDonald claimed that in February 1909 he and Millett met at Knoxville Tennessee, and formed a partnership in railroad construction work; that he was to put in his equipment, worth perhaps $30,000 and Millett was to put in $50,000 in cash and Millett was to be allowed six per cent interest on his money and McDonald was to be allowed six per cent interest and a salary was to be made upon his equipment, and that these moneys were advanced by Millett to McDonald for the expenses of said partnership, and that the partnership ended in December following without any contracts being taken or any work being done; and he claimed to have spent $6,000 or $8,000 in expenses in travelling about the country and trying to get contracts, and while he did state

that Millett made a part of these trips with him, he stated that Millett did not always go with him and he implied that Millet's expenses may have been less than his own; but that the affairs of said partnership had not been settled and that since this suit was begun, he had filed a bill in equity against Millett to have the accounts of the firm settled, in which he set up these moneys as advanced by Millett to the partnership. Millett denied that any partnership was ever formed, but alleged that they agreed at Knoxville to try to get some contracts for railroad construction work, and, if they obtained such contracts, they would be partners in such work, but that no contracts were obtained and no partnership was formed; and also that these moneys were not advanced in any partnership matter but were loaned by him to McDonald to meet McDonald's own pressing financial necessities. The correspondence which afterwards followed between the partics ~~is~~ in evidence and shows repeated promises by McDonald to pay Millett these loans and one of them shows that he had paid $192 interest thereon and in none of the letters did McDonald claim that these moneys were advanced in a partnership transaction. ~~The jury were fully~~ instructed in favor of McDonald, if these were partnership matters. Millett complains of the refusal of one instruction on that subject, but we are of the opinion that the ground was fully covered by instructions that were given. This issue was determined by the jury against McDonald and we are of opinion that the preponderance of the evidence sustains that conclusion.

McDonald claimed three items of set-off. He alleged that he had sold and delivered to Millett a certain engine [illegible] certain steel rails for $416, and that he had loaned Millett $800. The engine and the rails were not where the parties were, and ~~the evidence is clear that~~ neither were ever delivered to Millett and never came into his possession, but they appear to have been seized

on attachment against McDonald. McDonald did give Millett a check for $200. McDonald testified that this was money which he loaned to Millett. Millett testified that he loaned McDonald this money and took this check in payment. ~~The jury found for Millett on this issue and the evidence does not warrant us in disturbing their conclusion.~~

On the cross examination of McDonald Millett's counsel called for letters of various specified dates, alleged to have been written by Millett to McDonald, and no such letters were produced by McDonald or his counsel. Thereupon counsel for Millett read to McDonald from various papers which he held in his hand, which purported to be carbon copies of such letters from Millett to McDonald, and asked McDonald whether he received such letters, to which McDonald replied that he did not know or did not remember, and counsel asked McDonald whether various statements read to him were true. This was all done over the objections of McDonald's counsel. ~~We are of the opinion that the course pursued was highly improper.~~ At that time no one had testified that these were in fact true copies of letters which had been written and mailed to McDonald, and they then appeared to be merely self serving declarations. ~~No such use should have been permitted of these papers~~ until it had been proved that they were true copies of letters which had been in fact, written and signed by Millett and duly mailed to McDonald properly addressed and stamped and placed in the Post Office. They could only then be evidence in favor of Millett if they appeared to be parts of a correspondence between the two upon the subjects involved in this suit. By reading them into questions their substance was placed before the jury before they had been shown to be competent evidence. But afterwards the necessary proof was made to admit these carbon copies in evidence in connection with various letters from McDonald to Millett.

We conclude that no harm was done to McDonald, though the letters should have been properly put in evidence before he was cross examined upon them. The conclusion is inevitable from all the correspondence that this money was not advanced in connection with any partnership transaction and that McDonald repeatedly recognized his personal liability to pay these moneys back to Millett. The abstract is meagre and omits important things. We have read all the evidence in the record and are satisfied that the jury could not have found differently except as to that as to the $400 check they might have found either way.

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____.

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 157

BE IT REMEMBERED, that afterwards, to-wit: on 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6220.

Jewel Tea Company, appellee

vs Appeal from Peoria.

A. T. Peterson, appellant.

Dibell, P. J.

The Jewel Tea Company, a corporation, hereinafter called the company, entered into a contract in writing with A. T. Peterson to carry on certain business for it in Peoria for certain compensations therein named, and the contract contained a provision that Peterson should not engage in the same business for twelve months after the contract should be terminated for any cause, in the territory in which he worked while in the employ of the company. The employment was terminated on May 22, 1915. Shortly thereafter Petersen entered into the same business in the same territory, and the company filed a bill to enjoin him from so doing and Petersen answered the bill. Thereafter by leave of court, the company filed an amended bill on September 13, 1915. On motion of Peterson, it was ordered that his answer, filed June [illegible], 1915, to the original bill, stand as his answer to the amended bill. Thereafter the application for a temporary injunction was heard upon affidavits presented by the respective parties, and the temporary injunction was granted. The affidavits were preserved by a certificate of evidence. This is an appeal from that order.

The bill shows that the office and principal place of business of the company was in Chicago and that it maintained a branch office, and place of business in Peoria. Its business is buying and selling and delivering teas, coffees, baking powder, extracts, spices, cocoa and other like merchandise. It sends agents to homes to solicit orders for such merchandise. It has a scheme by which, if a customer orders a certain amount of such goods, the customer receives certain other household

Jan. 10. 1910.

Jewel Tea Company, appellee

vs Appeal from Peoria.

A. T. Peterson, appellant.

Dibell, P. J.

The Jewel Tea Company, a corporation, hereinafter called the company, entered into a contract in writing with A. T. Peterson to carry on certain business for it in Peoria for certain compensations therein named, and the contract contained a provision that Peterson should not engage in the same business for twelve months after the contract should be terminated for any cause, in the territory in which he worked while in the employ of the company. The employment was terminated on Oct. 28, 1912. Shortly thereafter Peterson entered into the same business in the same territory, and the company filed a bill to enjoin him from so doing and Peterson answered the bill. Thereafter by leave of court, the company filed a supplemental bill on September 13, 1913. To this bill of Peterson, it was averred that his answer, filed June 26, 1913, to the original bill, should be his answer to the supplemental bill. Thereafter the application for a temporary injunction was heard upon affidavits presented by the respective parties, and the temporary injunction was granted. The affidavits were introduced by a stipulation of evidence, into the record from that order.

The bill shows that the office and principal place of business of the company was in Chicago and that it maintained a branch office and place of business in Peoria. The business was buying and selling and delivering teas, coffees, baking powder, extracts, spices, cocoa and other like merchandise. It sends agents to homes to solicit orders for such merchandise. It has a scheme by which, if a customer orders a certain amount

merchandise as a premium. Its agents have horses and wagons, and each agent has a specified territory to work in, and when a customer has once been secured, effort is made to retain that customer and to secure future orders from the same party. Each agent keeps a bookcontaining the name and orders of each of his customers and some data as to the amount of trade of each customer. Such books also go to the office daily. The bill is very full in details showing how complete a knowledge each agent has of the customers on his route. The contract with Petersen contained the following clauses:

"Party of the second part further agrees that on the termination of this contract, or upon leaving the employ of the party of the first part for any cause, thatshe will promptly turn over to the party of the first part all books of account, papers, orders and all other property belonging to said party of the first part and used in the business of the said party of the first part.

Party of the second part further agrees that he will not at any time while in the employ of the party of the first part solicit or take orders from or deliver teas, coffees, baking powder, extracts, spices and cocoa to any of the customers of the party of the first part, for himself or any other person or company other than first party; also that he will not within a period of twelve months after leaving, for any cause, the service of party of the first part, for himself or for any other person or company, solicit or take orders from or deliver teas, coffees, baking powder, extracts, spices or cocoa, to any of the customers of the first party in the territory in which he worked while in first party's employ, and especially agrees not to interfere with the trade or business of the party of the first part as now transacted or carried on with its customers in said territory where a party of the second part had been working.

merchandise as a premium. The agents have horses and wagons, and each agent has a specified territory to work in, and when a customer has once been secured, effort is made to retain that customer and to secure future orders from the same party. Each agent keeps a bookkeeping [illegible] of his customers and [illegible] as to the amount of trade of each customer. Such books also go to the office daily. The bill is very full in details showing how complete a knowledge each agent has of the customers on his route. The contract with Petersen contained the following clauses:

"Party of the second part hereby agrees that on the termination of this contract, or upon leaving the employ of the party of the first part for any cause, that he will promptly turn over to the party of the first part all books of account, papers, orders and all other property belonging to said party of the first part and used in the business of the said party of the first part.

Party of the second part further agrees that he will not at any time while in the employ of the party of the first part solicit or take orders from or deliver teas, coffees, baking powder, extracts, spices and cocoa to any of the customers of the party of the first part. Nor directly or by other person or company other than first party, also that he will not retain a period of twelve months after leaving, for any cause, the service of party of the first part, for himself or for any other person or company, solicit or take orders from or deliver teas, coffees, baking powder, extracts, spices or cocoa, to any of the customers of the first party in the territory in which he worked while in first party's employ, and especially agrees not to interfere with the trade or business of the party of the first part as now transacted or carried on with its customers in said territory where a party of the second part has been

Party of the second part further agrees, as a condition precedent, that he will not directly or indirectly through himself or others, take away or attempt to divert any of the custom, business or patronage of the party of the first part with its customers in said territory for a period of twelve months after leaving for any cause, the employ of the party of the first part.

Party of the Second part further agreed, as a condition precedent, that he will not engage either for himself or any other person, persons, or company in the tea and coffee business nor will he offer for sale any tea, coffee, baking powder, extracts, spices, cocoa or other merchandise during the life of this contract nor for a period of twelve months after the termination of this contract, for any cause, or after leaving for any cause whether before or after the termination of this contract, the employ of the first party, in the cities of Peoria, Lacon, Henry, Chillicothe, Illinois."

The bill charged that Petersen had full knowledge of the customers on the route which he had and on one other route, and that upon the termination of the contract he entered into the same business and travelled over these routes and solicited trade in the same articles with customers of the company, and sold such customers like merchandise. The bill sought to enjoin him from violation of the agreement for twelve months from the termination of his employment, and alleged two grounds of jurisdiction, namely, that the company could not have an adequate remedy at law, because it would be impossible to ascertain how much trade which belonged to complainant he withdrew for his own advantage, and how much trade he had in the company's locality, and also because Petersen was insolvent. The proof showed that Petersen circulated a business card, in which he described himself as formerly manager of the Jewel Tea Company.

Party of the second part further agrees, as a condition precedent, that he will not directly or indirectly through himself or others, take away or attempt to divert any of the custom, business or patronage of the party of the first part with its customers in said territory for a period of twelve months after leaving for any cause, the employ of the party of the first part.

Party of the second part further agreed, as a condition precedent, that he will not engage either for himself or any other person, persons, or company in the tea and coffee business nor will he offer for sale any tea, coffee, baking powder, extracts, spices, cocoa or other merchandise during the life of this contract nor for a period of twelve months after the termination of this contract, for any cause, or after leaving for any cause whether before or after the termination of this contract, the employ of the first party, in the cities of Peoria, Lacon, Henry, Chillicothe, Illinois."

The bill charged that Peterson had full knowledge of the customers on the route which he had and on one other route, and that upon the termination of the contract he entered into the same business and travelled over these routes and solicited trade in the same articles with customers of the company, and sold such customers like merchandise. The bill sought to enjoin him from violation of the agreement for twelve months from the termination of his employment, and alleged two grounds of jurisdiction, namely, that the company could not have an adequate remedy at law, because it would be impossible to ascertain how much trade which belonged to complainant he withdrew for his own advantage, and how much trade he made in the company's locality, and also because between the parties, The proof showed that Peterson circulated a business card, in which he described himself as formerly manager of the local

It is contended that the order for the issue of a temporary injunction was erroneous, because the bill did not pray for a writ of injunction in the prayer for process. The bill contained the following: "May it please your honors to grant unto your orator the People's writ of injunction, to be directed to the said A. T. Petersen, defendant. enjoining and restraining him during the pendency of this suit from" (here follow the details of the injunction desired,) "and your orator further prays that upon the hearing hereof a temporary injunction so issued shall be made permanent." A prayer for process followed. We are of opinion that there was a prayer for a writ of temporary injunction, and that it is not rendered invalid because the person who drew the bill did not put the prayer for summons in the same paragraph but in the next.

The order for an injunctionprovided for an injunction bond with security to be approved by the clerk of the court, whereas the statute (Chap.83, Sec.8.) requires the security to be approved by the court, judge or master. It is argued that for that reason the injunction order should be reversed. This error can work no injury to Petersen as the obligors cannot escape liability on the ground that the bond was not approved by the proper authority. The court below can remedy the defect upon proper application. O'Brien v City of Elgin, 127 Ill. 433.

It is contended that the court should not have granted an injunction after answer filed. That depends upon the nature of the answer. The bill had a copy of the contract attached to it as an exhibit. Defendant answered that it was not a true copy. He did not point out in that respect it was not a true copy. He did not deny but what it was a substantial copy. He did not deny that it was a true copy as to any part thereof material to this cause. He admitted the making of the contract [illegible]

It is contended that the order for the issue of a temporary injunction was erroneous, because the bill did not pray for a writ of injunction in the prayer for process. The bill contained the following: "May it please your honors to grant unto your orator the People's writ of injunction, to be directed to the said A. T. Petersen, defendant, enjoining and restraining him during the pendency of this suit from" (here follow the details of the injunction desired), "and your orator further prays that upon the hearing hereof a temporary injunction so issued shall be made permanent." A prayer for process followed. We are of opinion that there was a prayer for a writ of temporary injunction, and that it is not material doubtless the pleader who drew the bill intended that the prayer for process in the same paragraph but in the next.

The order for an injunctionprovided for an injunction bond with security to be approved by the clerk of the court, whereas the statute (Chap.65. Sec.8.) requires the security to be approved by the court, judge or master. It is argued that for that reason the injunction order should be reversed. This error can work no injury to Petersen. He is liable on the bond for any liability on the ground that the bond was not approved by the proper authority. The court below construed the defect upon proper application: O'Brien v City of Elgin, 187 Ill. App. 1.

It is contended that the court should not have granted an injunction after answer filed. That depends upon the nature of the answer. The bill had a copy of the contract attached to it as an exhibit. Defendant answered that it was not a true copy. He did not point out in what respect it was not a true copy. He did not deny but admit it was a substantial copy. He did not deny that it was a true copy as to any part material to this cause. He regard it therefore as a substantial copy. He admitted the making of the contract and that it was terminated

and that he had gone into the same business and sought to trade with the customers of the company, ~~all of which was in viola-~~ tion of the portions of the contract above quoted. The contract provided that Petersen was thereby employed, not only to take orders for and deliver and sell teas, etc. but also "to perform such other duties as the party of the first part may from time to time specify and require of him." The bill showed that during the term of his employment and after a conference with the officers in Chicago, his duties were changed from that of a wagon man and route agent to office duties in the branch office at Peoria. Petersen contends that that change was an abandonment of this contract and that he was no longer bound by it and could enter into the same trade in Peoria with the customers of the company at any time after leaving its employment. We are of opinion that the language last above quoted from the contract shows that the change made in his duties was within the terms of the contract and that he was still bound thereby.

Petersen contends that the bill alleges the cancellation and rescission of this contract and he is thereby relieved of its obligations. The paragraph of the bill in question did get that on or about May 22, 1915, in consideration of $87.50, then paid by the company to Petersen and accepted by him as the payment for one week's salary in advance, "the aforesaid contract of employment of the defendant by your orator was then and there terminated by mutual agreement." Considering this paragraph of the bill in connection with all the other allegations, it is clear to us that it means that Petersen's employment for the company was terminated by mutual agreement and not that the written contract was abrogated. The entire bill is an effort to enforce certain provisions of that contract and the company did not mean to charge that the contract was not in force and not binding upon Petersen, but exactly the contrary.

and that he had gone into the same business and sought to trade with the customers of the company, all of which was in viola-tion of the portions of the contract above quoted. The con-tract provided that Petersen was thereby employed, not only to take orders for and deliver and sell teas, etc. but also "to perform such other duties as the party of the first part may from time to time specify and require of him." The bill showed that during the term of his employment and after a conference with the officers in Chicago, his duties were changed from that of a wagon man and route agent to a fixe duties in the branch office at Peoria. Petersen contends that that there was an abandonment of this contract and that he was no longer bound by it and could enter into the same trade in Peoria with the customers of the company at any time after leaving its employment. We are of opinion that the language last above quoted from the contract shows that the change made in his duties was within the terms of the contract and that he was still bound thereby.

Petersen contends that the bill alleges the cancellation and termination of this contract and he is thereby relieved of its obligations. The paragraph of the bill ~~incorporates~~ alleges that on or about May 22, 1915, in consideration of $27.50, then paid by the company to Petersen and accepted by him as the payment for one week's salary in advance, "the aforesaid contract of employment of the defendant by your orator was then and there terminated by mutual agreement." [illegible] paragraph of the bill in connection with all its other alle-gations, it is clear to us that it means that Petersen's employ-ment for the company was terminated by mutual agreement and not that the written contract was abrogated. The entire bill is an effort to enforce certain provisions of that contract and the company did not mean to charge that the contract was not

The answer denies that the employment was so terminated and declares that Petersen was discharged, and that under another clause of the contract he was ~~entitled~~ then entitled to thirty days additional pay and did not receive it, and therefore the company broke the contract and can assert no equitable rights under it. It does not appear that he ever claimed any additional compensation or expected that he would be paid anything further, and we are of opinion that the company is not precluded from enforcing the provisions here relied upon by the fact that it has not paid Petersen something which he has not asked for.

Counsel for Petersen suggest that if we do not reverse this order, the temporary injunction will probably remain in force till May 22, 1916, and the company will thereby have all the benefit of a final decree in its favor. It is equally true that the denial of a temporary injunction would practically preclude the company from any equitable relief. Upon the admissions of the answer and the showing made in the affidavits offered by the defendant, as well as by the complainant, we are clearly of the opinion that Petersen is violating his contract and that he should be restrained from so doing, because it is manifest that the damages which such violation will inflict upon the company will be practically impossible of ascertainment.

The order is affirmed.

Niehaus, J. took no part.

The answer denies that the employment was so terminated and declares that Petersen was discharged, and that under another clause of the contract he was entitled to thirty days additional pay and did not receive it, and therefore the company broke the contract and can assert no equitable rights under it. It does not appear that he ever claimed any additional compensation or expected that he would be paid anything further, and we are of opinion that the company is not prevented from enforcing its provisions here relied upon by the fact that it has not paid Petersen anything which he has not asked for.

Counsel for Petersen suggest that if we do not reverse this order, the temporary injunction will probably remain in force till May 25, 1918, and the company will thereby have all the benefit of a final decree in its favor. It is equally true that the denial of a temporary injunction would practically preclude the company from any equitable relief. Upon the admissions of the answer and the showing made in the affidavits offered by the defendant, as well as by the complainant, we are clearly of the opinion that Petersen is violating his contract and that he should be restrained from so doing, because it is manifest that the damages which such violation will inflict upon the company will be practically impossible of ascertainment.

The order is affirmed.

Mikesus, J. took no part.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

61.2

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 175

BE IT REMEMBERED, that afterwards, to-wit: on FEB 8 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8133.

American Steel & Copper Plate Co.

appellee.

vs Appeal from DuPage.

H. H. Bilter, et al appellants.

Carnes, J.

On May 23, 1913, H. H. Bilter, his wife and two sons, Raymond R. Bilter and H. C. Bilter, the four ~~appellees~~ plaintiffs, were living as one family in a residence owned by H. H. Bilter in Elmhurst, DuPage County, Illinois. He also owned a farm of about 133 acres in the same county and was indebted to parties other than ~~appellee~~ plaintiff in amounts aggregating $34,550.00. On that date summons was served upon him ~~xx~~ in a common law suit by the ~~appellee~~ plaintiff, American Steel and Copper Plate Company. Four days thereafter for an expressed consideration of one dollar he conveyed, his wife joining with him, all said real estate to said two sons by deed that was duly recorded. The common law suit brought by ~~appellee~~ plaintiff terminated October 18, 1913, in a judgment against him of $442.31. Execution issued thereon, and he filed a schedule of his personal property showing a valuation of less than his exemptions of $400.00. The execution was levied on all the real estate so conveyed and ~~appellee~~ plaintiff filed its bill in equity in this case in aid of the execution. Issues were joined, the cause referred to the master in chancery who reported the evidence with his conclusion that the prayer of the bill be granted. Objections and exceptions to the master's report were filed and overruled, and a decree entered setting aside the conveyance and subjecting the property to the lien and payment of the judgment and execution, from which decree this appeal ~~is~~ has been prosecuted.

The evidence shows that the real consideration for said conveyance was an agreement in writing by the grantees to assume and

Cas. No. 9124.

Jackson Steel & Copper Plate Co.

Appellee.

vs

Appeal from DuPage.

R. C. Elder, et al Appellants.

Brief, 1.

On July 20, 1910, H. R. Elder, his wife and two sons, Raymond R. Elder and R. C. Elder, the four appellees, were living as one family in a residence owned by H. R. Elder in Downers Grove, DuPage County, Illinois. One [illegible] lived in the same county and was indebted to parties other than appellee in amounts aggregating $14,580.00. On that date summons was served upon him in a common law suit by the Jackson Steel and Copper Plate Company. Four days thereafter for an expressed consideration of one dollar he conveyed, his wife joining with him, all said real estate to his two sons by deed that was duly recorded. The common law suit brought by the Jackson Company terminated October 15, 1910, in a judgment against him of $14,[illegible]. Execution issued thereon. He filed a schedule of his personal property showing a valuation of less than his exemptions of $400.00. The execution was levied on all the real estate conveyed and appellee filed its bill in equity in this case in aid of the execution. Issues were joined, the cause referred to the master in chancery who reported the evidence with his conclusion that the prayer of the bill be granted. Objections and exceptions to the master's report were filed and overruled, and a decree entered setting aside the conveyances and ordering the property to the lien and payment of the judgment and execution, from which decree this appeal has prosecuted.

The evidence shows that the trial magistrate for the [illegible]

pay the before mentioned indebtedness of their father to parties other than ~~appellee~~ plaintiff; that the grantees understood that the transfer covered all the real estate and personal property of their father. Evidence was introduced by ~~appellee~~ plaintiff as to the market value of the real estate from which the master found that at the time of the transfer the fair cash value of the residence in Elmhurst was $6,000.00 and of the farm $45,415.00 making an aggregate of $51,415.00. ~~Appellees evidence supported the finding, and~~ No evidence to the contrary was introduced except that it was shown, subject to objection, that the assessed valuation of the property for purposes of general taxation was less than the amount agreed by the grantees to be paid for it, and the grantees testified that at the time of the ~~transaction~~ transfer they arrived at the value of the property by a computation as to its net revenue, and the result was about the amount they agreed to pay for it. The property had a market value. ~~Evidence as to the assessed~~ valuation was incompetent and immaterial (Lewis v Englewood Elevator R. R. Co. 223 Ill. 223; Kelly v People's Nat'l. Fire Ins. Co. 181 Ill. App. 142.) Neither can market value be ascertained by philosophical computations of what property ought to be worth on a basis of revenue. Even on the question of intrinsic value net revenue is only one of ~~several considerations~~. The master concluded that the amount agreed to be paid by the grantees was about 45 per cent of the value of the property. ~~Appellants~~ ingeniously argue that the evidence does not satisfactorily lead to that conclusion. It may be, had they seen fit to introduce competent evidence as to the market value of the property, it would have appeared that the grantees were agreeing to pay fifty five per cent of its value. The exact per cent is not very important here and quite likely for that reason appellants did not go further into the matter. There is no question but that any fair investigation would have resulted in a showing that as

to approximately half the market value of the property it was a voluntary conveyance.

The grantees testified they did not, at the time of the transfer, know of their father's indebtedness to ~~appellee~~ plaintiff and there ~~is~~ no direct evidence that they did then know of it, ~~although considering the relation of the parties and the apparent~~ purpose to transfer all the father's property to his sons on their a suming all his debts except whatever might be found due from him to appellee, it is taxing credulity to believe that the grantees had no knowledge or notice that there was a suit pending by appellee against their father. ~~The transaction amounted~~ to an assignment for the benefit of all creditors except appellee with a voluntary gift over to the assignees at about half the market value of the property ~~assigned~~. The parties continued to live together under an arrangement, they say, that the father should work for the grantees for his board. ~~It is manifest~~ that it would be much against equity and good conscience to permit appellee to be in this way defeated in the collection of what we must regard a just debt, and we do not think there is any rule of law or equity that should have prevented the chancellor from entering the decree which a common sense of justice demanded.

It is argued by appellants that the grantees paid a consideration for the land; that the fact of relationship gives rise to no presumption of law against the good faith of the sale, and that as a rule to render a sale fraudulent as to creditors of the vendor there must be mutuality of anticipation in the fraudulent intent on the part of both the vendor and the purchaser, and that the burden of proving the conveyance fraudulent was on appellee. These propositions of law are supported by authority. It is true that a creditor in failing circumstances may deal with his relatives, and if there are no indications of fraud no presumption arises from the relationship. Schroeder v. Walsh

to approximately half the fair value of the property it was a voluntary transfer.

The grantees testified they did not, at the time of the transfer, know of their father's indebtedness to appellee and there is no direct evidence that they did then know of it, although corroborating [illegible] appellee, [illegible] purpose to transfer all the father's property to his sons on their assuming all the debts [illegible] from him to appellee, it is [illegible] the grantees had no knowledge or notice that there was a suit pending by appellee against their father. [illegible] to an assignment for the benefit of all creditors except appellee with a voluntary gift over to the assignees of about half the [illegible] value of the property assigned. The parties continued to live together under an arrangement, they say, that the father should work for the [illegible]. It would be much against equity and good conscience to permit appellee to be in this way defeated in the collection of what we must regard a just debt, and we do not think there is any rule of law or equity that should have prevented the chancellor from entering the decree which a common sense of justice demanded.

It is argued by appellants that the grantees paid a consideration for the land; that the fact of relationship gives rise to no presumption of law against the good faith of the sale, and that as a rule to render a gift fraudulent as to creditors of the vendor there must be notability of participation in the fraudulent intent on the part of both the vendor and the purchaser, and that the burden of proving the conveyance fraudulent rest on appellee. These propositions of law are supported by authority. It is true that a creditor in raising circumstances may deal with his relatives, and if there are no indications of fraud on

120 Ill. 403 is cited in support of that proposition. But the court said in that case that relationship may excite suspicion and may be considered with other evidence tending to impeach the transaction. Perhaps the rule is that if the transaction with a relative is one that might naturally be presumed if the relation had not existed, then the fact of relationship does not matter. In the present case it cannot be reasonably presumed, the conveyance would have been made on those terms to one not a relative. The inadequacy of the consideration forbids any such conclusion, and is of itself a strong indication of fraud. It is said in 20 Cyc 441 - "Inadequacy of consideration is a fact calling for explanation, and therefore a badge of fraud especially when such inadequacy is gross." This text is supported by numerous authorities of Illinois and other states, and is a correct expression of law. It does not matter whether we say fraud in fact or fraud in law, and it may be doubted whether the fact that either or both of the parties were ignorant of this debt would be controlling. If the actual consideration had been the one dollar expressed in the deed, and the grantees had known of none of the indebtedness of their father, the conveyance, of course, could not have stood against such creditors, and there is no equitable reason why it should stand against appellee in this case even if it had been true that the father and his sons all forgot about the debt at the time the transfer was made.

It appeared that the grantees had paid some of the indebtedness that they assumed in purchasing the property, and it is suggested by appellants that they ought to have been protected by the decree as to such payments. The answer is that they asked no protection from the court. We need not here determine whether they would be entitled to any.

The decree is affirmed.

Affirmed.

126 Ill. 426 is cited in support of that proposition. But the court held in that case that relationship may excite suspicion and may be considered with other evidence tending to impeach the transaction. Perhaps the rule is that if the transaction with a relative is one that might naturally be presumed if the relation had not existed, then the fact of relationship does not matter. In the present case it cannot be reasonably presumed the conveyance would have been made on those terms to one not a relative. The inadequacy of the consideration [illegible] any such conclusion, and is of itself a strong indication of fraud. It is said in 20 Cyc 451 - "Inadequacy of consideration is a fact calling for explanation, and therefore a badge of fraud especially when such inadequacy is gross." This text is supported by numerous authorities of Illinois and other states, and is a correct expression of law. It does not matter whether we say fraud in fact or fraud in law, and it may be doubted whether the fact that either or both of the parties were ignorant of this debt would be controlling. If the actual consideration had been the one dollar expressed in the deed, and the grantees had known of none of the indebtedness of their father, the conveyance, of course, could not have stood against such creditors, and there is no equitable reason why it should stand against appellee in this case even if it had been true that the father and his sons did not know about the debt at the time the transfer was made.

It appeared that the grantees had paid some of the indebtedness that they assumed in purchasing the property, and it is suggested by appellants that they ought to have been protected by the decree as to such payments. The answer is that they asked no protection from the court. We need not here determine whether they would be entitled to any.

The decree is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

Clerk of the Appellate Court.

612

1801

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 183

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6123.

Ralph Jester, appellant.

vs Appeal from Peoria.

David S. Lee, appellee

Carnes, J.

Appellant, Ralph Jester, claimed that at the request of David S. Lee, the appellee, he procured a purchaser of a business property of appellee's in the city of Peoria, and was entitled to $777.50 commissions, and brought this suit to recover that amount. A trial by the court without a jury resulted in a judgment for the defendant, from which this appeal is taken.

The property in question was in September 1911, occupied by the Minnesota Threshing Machine Company as a tenant of Lee, and by the Hart Foundry Company, a sub-tenant. Jester was not a real estate agent, but was manager of the Peoria branch of the Threshing Machine Company and in charge of their business there. Some question arose as to the use and repair of the building. Jester and Lee discussed that matter on September 21 or 22, 1911. In their testimony they agreed as to what was said at that meeting and differed only as to the date whether the 21st. or 22nd. In this talk Lee suggested that the Threshing Machine Company ought to buy the property, and Jester replied that he did not think they would buy it but that he intended to visit the factory at Minneapolis soon and he would suggest the matter to them. Lee, either at that conference or thereafter on that day - it is not material which, wrote on a slip of paper the figures $43,500.00, and handed it to Jester as his price for the property. Jester afterwards went to Minneapolis and saw the officers of his company and learned that it would not buy the property. He testified that he got back from Minneapolis September 27, and thinking that the Hart Company might buy the property, he spoke to Stacy B. Hart, an officer of that company, about it; that

Cal. 1v. Alex.

Eight Cases Appealed.

vs Appeal from Peoria.

David S. Lee, Appellee.

Filed, 4.

Appellant, Ralph Teeter, claimed that at the request of David S. Lee, the appellee, he procured a purchaser of a business property of appellee's in the city of Peoria, and was entitled to $777.50 commissions, and brought this suit to recover that amount. A trial by the court without a jury resulted in a judgment for the defendant, from which this appeal is taken.

The property in question was in September 1911, occupied by the Minnesota Threshing Machine Company as a tenant of Lee, and by the Hart Foundry Company, a sub-tenant. Teeter was not a real estate agent, but was manager of the Peoria branch of the Threshing Machine Company and in charge of their business there. Some misunderstanding as to the use and repair of the building. Teeter and Lee discussed that matter on September 23 or 24, 1911. The trial testimony tends greatly to show that at that meeting Lee offered to sell the lease whether the plant, or land. In this lease the expiration date is November 1, 1912. Teeter said he was the property, and Teeter replied that he did not think they would buy it but that he intended to visit the factory at Minneapolis soon and to would suggest the matter to them. Lee, either at that conference or thereafter on that day - it is not material which, wrote on a slip of paper the figures $40,000, and handed it to Teeter as the price for the property. Teeter afterwards went to Minneapolis and saw the officers of the company and learned that it would not buy the property. He testifies that he got back from Minneapolis September 27, and thinking that the Hart Company might buy the property, he wrote

afterwards about September 30 he saw Lee and told him that he thought he could find a purchaser for the property and Lee said all right, if he could he would pay him what was right; that he then told Lee he thought the Hart Company would buy it if they could make arrangements to borrow the money, and Lee said all right; that he gave Hart the piece of paper Lee had handed him with the price marked on it and had various conversations with Hart about it, and some conversations with Walter Wilde, who was acting in behalf of the Hart Company in the matter, and talked with Lee about it several times, and that the transactions ended in the Hart Company obtaining a loan of Proctor Endowment and punchasing the property. It is true that the Hart Company did buy it. The deed of conveyance and its acknowledgment bears date October 20, 1911. At the time of the trial Stacy B. Hart was dead. Walter Wilde testified that Hart called his attention to the matter of the purchase of the property and handed him the slip of paper with the memorandum of price on it; that he went to see Lee and told him he understood the property was for sale at the price named, and asked if they could have credit for a part of the purchase price if they bought it. Lee said no, he wanted to use the money, but that he would sell to them at the same price he had made to the Threshing Company. Whereupon Wilde applied for and obtained a loan from the Proctor Endowment and the trade was consummated. Wilde, testifying for plaintiff says he does not remember having any conversation with Jester about it, but that he got his information with the piece of paper from Hart and understood Hart had been talking with Jester; he ~~is~~ was not certain when he got this piece of paper from Hart but mentioned a date consistent with Jester's statement that he gave the piece of paper to Hart and interested Hart in the matter after he, Jester, returned from Minneapolis September 27, and at about the time when he saw Lee agreed to pay him if he found a pur-

Afterwards about September 20 Mr. Lee and told him that he thought he could find a purchaser for the property and Lee said all right, if he could he would pay him back the right; that he thought Lee is thought the Hart Company would buy it if they could make arrangements to borrow the money, and Lee said all right; that he gave Hart the price of August Lee but denied him with the price hanged on it and had various conversations with Hart about it, and some conversations with Walter Wilks, the [illegible] of Hart Company in the matter, and talked with Lee about it several times, and that the transactions named in the Hart Company obtaining a loan of Fraeter Bowman and pledging the property. It is true that the Hart Company put it. The deed of conveyance and its acknowledgment were made [illegible] was done. Mr. Wilks stated that Hart would see the attention in the matter of the purchase of the property and handed him the sum of paper with the memorandum of price on it; [illegible] Lee and told him he guarantee, the property was for sale at the price named, and asked if they could have [illegible] part of the purchase price if they bought it. Lee said no, he wanted to use the money, but that he would call [illegible] some price as had come to the Thursday Company. Thereupon Wilks applied for and obtained a loan from the Fraeter Tobacco Company [illegible] was consummated. Wilks testifying for [illegible] says he does not remember having any conversation with Lee [illegible] but that he got his information with the price of [illegible] from Hart and understood Hart had been talking with [illegible] Hart and interested Hart in the matter [illegible] Lee [illegible] Hart [illegible] Lee [illegible]

chaser; but Wilde said that he made the application for the loan to the Proctor Endowment after talking with Lee and after knowing that they could have the property if they procured the loan.

Lee, after stating his first interview with Jester, and his offer to sell the property for $43,500.00 to Jester's company, said that he never made any other proposition to Jester about selling the property or finding a purchaser for it; that Wilde came to him the day after his, Lee's, first talk with Jester and inquired about the property. Lee stated the conversation substantially as Wilde did; said that he suggested to Wilde that a loan could be procured of the Proctor Endowment; that the matter was taken up and proceeded to the sale; that Jester never said anything to him about the Hart purchase until October 10 when he came into his office and said something to him about the Hart people being about ready to make a contract for the property, that he made no answer whatever to the suggestion, and that was the only time that Jester said anything to him about the sale of the property except what was first said about the Threshing Machine Company buying it. Each of the parties ~~is~~ corroborated to some extent in his testimony. There ~~is~~ was a sharp and direct conflict on the question whether the Hart Company were moved by Jester after his return from Minneapolis on September 27 to purchase the property, or whether they took up the matter with Lee and had it practically arranged before Jester got back from Minneapolis, and before Jester himself claims he had any authority to act for Lee except to carry a message to his own company of Lee's price on the property. There ~~is~~ also a direct conflict between Lee and Jester whether at any time Lee authorized Jester to find a purchaser for the property and offered to pay him for it. Under the testimony of the various witnesses and their statements of dates as they recollect them, it might perhaps have been found that Jester's statement was sustained by the

[illegible] Wilde said that he made the application for the loan as the Proctor Endowment after talking with Lee and after knowing that they could have the property if they secured the loan.

Lee, after stating his interview with Jester, said his offer to sell the property for $13,500.00 to Jester's [illegible], said that [illegible] [illegible] selling the property or finding a purchaser for it; that Wilde came to him the day after Lee's, first talk with Jester and inquired about the property. Lee stated the conversation substantially as Wilde did; said that he suggested to Wilde that a loan could be procured of the Proctor Endowment; that the matter was taken up and proceeded to the sale; that Jester never said anything to him about the Hart purchase until October 10 when he came into his office and said something to him about the Hart people being about ready to make a contract for the property; that he made no answer whatever to the suggestion, and that was the only time that Jester said anything to him about the sale of the property except that was first said about the Thoughing Machine Company buying it. Each of the parties was corroborated to some extent in his testimony. There was a sharp and direct conflict on the question whether the Hart Company were moved by Jester after his return from Minneapolis on September 27 to purchase the property, or whether they took up the matter with Lee and had it practically arranged before Jester got back from Minneapolis, and were Jester himself claims. He had by authority to act for Lee except to carry a message to his two [illegible] of Lee's price on the property. There was also a [illegible] between Lee and Jester whether at any time Lee authorized Jester to find a purchaser for the property and offered to pay him [illegible]. Under the testimony of the various witnesses and their [illegible] it might perhaps

~~greater weight of evidence but rather the fact that~~ The foundry company's written application for the loan from the Proctor Endowment was produced in evidence and bore date September 26, 1911. It also appeared that an appraisement of the property was made for the purpose of the loan, and a written report of that appraisement, which ~~bore~~ date September 28, 1911, the appraiser testifying that he was employed and examined the property three or four days earlier than the date of the report. ~~The dates on~~ these two papers made it certain that the sale of the property to the Hart Company was practically arranged between Lee and Tilas before Jester got back from Minneapolis September 27, 1911, and before he, himself, claimed that he had any authority to act in the matter. With this unmistakable evidence in the case the natural conclusion is that Lee is stating the whole matter correctly and is to be believed. It is unreasonable to suppose that after Lee had practically arranged a sale to Hart Brothers he would contract to pay Jester a commission for finding a purchaser for the property. The court evidently took this view of the situation and did not err in so doing.

There is some discussion in appellant's brief about the law of the case, but there is no disputed question of law involved. If Jester is to be believed he was clearly entitled to a finding and judgment in his favor. If Lee is to be believed it is quite as clear that he was entitled to a finding and judgment in his favor. The plaintiff offered three propositions of law on the trial. Number 3 was to the effect that if the greater weight of the evidence showed a contract to find a purchaser, and the plaintiff did find a purchaser, and the defendant did sell to the purchaser, the plaintiff is entitled to recover the usual, ordinary and customary commissions. This the court held. Number 1 contained substantially the same proposition but included a

holding that the plaintiff had proved by the greater weight of evidence that he furnished the buyer. This the court refused. Number 2 contained practically the same proposition as Number 3 except the measure of recovery in Number 2 was stated as whatever the services were reasonably worth. The court refused to hold this. There was no error in either refusal. No question of value of services rendered is involved. There is uncontradicted evidence that such services if rendered, were worth more than the plaintiff demanded either on a basis of usual and customary charges or of reasonable value of such services.

The plaintiff offered to prove that Lee and the officers of the Hart Company were not on speaking ~~xxx~~ terms, and that Wilde had never talked with Lee about the purchase before the slip of paper was given him by Hart. The court sustained objections to questions calling for these answers, and this is assigned as error. In trials before the court without a jury it is, as a rule, quite as well to permit incompetent questions to be answered and in that way ~~xx~~ get into the record, as to sustain objections to the question and let offers to prove get into the record, which last method is necessary in jury trials where the offer to prove is usually made out of the presence of the jury; but we see no error inthis action of the court. There was no claim that Wilde had seen Lee about the matter before he got the slip of paper, and one would understand from his testimony that he had not, and whether he was friendly or unfriendly to Lee he certainly did go to him and negotiate the purchase ~~xx~~ of the property. Finding no error in the record, the judgment is affirmed.

Affirmed.

Niehaus, J. took no part.

that the plaintiff had proved by the better weight of evidence that he furnished the lumber. This the court refused. Number 2 contained practically the same proposition as Number 3 except the measure of recovery in Number 4 was stated as whatever the services were reasonably worth. The court refused to give this. There was no error in either ruling. No question of value or services rendered is involved. There is uncontradicted evidence that such services if rendered, were worth more than the plaintiff demanded either on a basis of usual and customary charges or of reasonable value of such services.

The plaintiff offered to prove that Lee and the officers of the Hart Company were not on speaking terms, and that Hills had never talked with Lee about the purchase before the slip of paper was given him by Hart. The court sustained objections to questions calling for these answers, and this is assigned as error. In trials before the court without a jury it is, as a rule, quite as well to permit incompetent questions to be answered and in that way to get into the record, as to sustain objections to the question. A fact offered to prove is in the record, which last method is necessary in jury trials.

Quite the offer to prove is as fully made out of the presence of the jury; but we see no error in this action of the court. There was no claim that Hills had seen Lee about the matter before he had the slip of paper, and one would understand from his testimony that he had not, and rather be was friendly to Hart's milling. Lee he certainly did go to him and negotiate the purchase of the property. Finding no error in the record, the judgment is affirmed.

AFFIRMED.

Hiscock, J. took no part.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 200

BE IT REMEMBERED, that afterwards, to-wit: on FEB 8 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6193.

Laura S. Thompson, Pltf. in error.

vs Error to LaSalle.

Ancient Order of Gleaners, &c.

Deft. in error.

Carnes, J.

The defendant in error, Ancient Order of Gleaners, is a fraternal beneficiary society of Detroit, Michigan, A local arbor was formed at Ransom, Illinois, in 1909. John H. Thompson the husband of plaintiff in error, was a ~~xxxxx~~ charter member of that arbor, and a benefit certificate for $1,000.00 was issued to him June 4, 1909, payable on his death to his wife. He met his death by an accident October 19, 1910. His widow brought this action to recover on that certificate. On a trial by the court without a jury there was a finding and judgment for the defendant. The plaintiff brings the record here for review.

One defense relied on ~~is~~ was that the insured was before his death suspended for non payment of dues and assessments and therefore was not at the time of his death a member of the order. The "dues" were payable quarterly, and one of the payments became due May 30, 1910. There was an asse ssment, number 90 the last day of payment of which was May 30, 1910. It ~~is~~ was not claimed that he made either of these payments at that time. Under the laws of the society the failure to pay dues or assessments operated as a suspension of the member, but it was provided that he might within thirty days, be reinstated by furnishing a certificate of good health from the regular arbor physician, which must be passed upon by the supreme medical examiner, but that after thirty days from the date of suspension he is ~~be~~barred from further reinstatement. It ~~is~~ was not claimed that the insured made any effort to be reinstated until the last of August 1910, but it ~~does~~ appear that he then went to Henry Siedentop, the secretary and treasurer

Dec. 8th, 1910.

Isaac G. Thompson, Plff., in error,

vs Error to Lawhills.

Ancient Order of Gleaners, Def.

Def. in error.

Gaines, J.

The defendant in error, Ancient Order of Gleaners, is a fraternal beneficiary society of Detroit, Michigan, a local order was formed at Hanson, Illinois, in 1908. John H. Thompson the husband of plaintiff in error, was a charter member of that order, and a benefit certificate for $1,000.00 was issued to him June 4, 1908. Upon his death to his wife. He met his death by an accident October 19, 1910. His widow brought this action to recover on that certificate. On a trial by jury without a jury there was a judgment for the defendant. The plaintiff asks for a reversal of the judgment.

The defense relied on the that he insured was before his death suspended for non payment of dues and assessments and therefore was not at the time of his death a member of the order. The "dues" were payable quarterly, and one of the payments became due May 30, 1910. There was an dues account, number 50 the last day of payment of which was May 30, 1910. It is not claimed that he made either of these payments at that time. Under the law of the society the failure to pay dues or assessments operated as a suspension of the member, but it was provided that he might within thirty days, be reinstated by furnishing a certificate of good health from the regular order physician, which must be passed upon by the medical examiner, and by a vote of the lodge from the date of delinquency to be reinstated from the date of reinstatement. It was further claimed that the insured had by a vote to be reinstated until the last of August 1910, but it does appear

of the local order, and offered to pay him the delinquent assessments and dues, and asked to be reinstated without furnishing the required local physician's certificate; that there then was no local physician, but deceased was told that the company would accept the certificate of another physician, naming him. Siedentop applied to the company to reinstate him under those conditions, and the application was refused. Plaintiff claims, ~~and there is evidence tending to support the claim,~~ that the insured paid Siedentop the money required to cover the delinquent assessments and dues. Siedentop testified that the insured did not pay him any money but offered to pay him, and he told him he would do the best he could for him, and report the dues paid, but he did not think he could in that way be reinstated and would not take his money until he knew more of the matter, or something to that effect. ~~The court was abundantly justified in finding Siedentop's statement of the transaction true. Under these facts deceased was not a member of the defendant society at the time of his death. His failure to pay dues and assessments automatically suspended him.~~ He could not become reinstated without complying with the requirements of the order unless somebody with authority waived those requirements. And even were it to be found that Siedentop, as secretary and treasurer of the local order, received these dues at the time of the requested reinstatement, still there is no ground for claiming that it operated as a reinstatement. It is clear, whether Siedentop took the money or not, he advised deceased at the time that it was doubtful whether he would be reinstated and it must depend on the action of the superior officers of the company. National Council v Dillon, 212 Ill. 530; Scheiber v The Protected Home Circle 146 Ill. App. 574.

The contract of insurance in this case, as is usual in such societies, included the constitution and by-laws of the society

of the local order, and offered to pay him the delinquent assessments and dues, and asked to be reinstated without furnishing the required local physician's certificate; that there then was no local physician, but deceased was told that the company would accept the certificate of another physician, naming him. Stainstop applied to the company to reinstate him under those conditions, but the application was refused. Plaintiff claimed there is evidence tending to support the verdict, that the insured paid Stainstop the money he paid to cover the delinquent assessments and dues. Stainstop testified that the insured did not pay him any money but offered to pay him, and he told him he would do the best he could for him, and report the dues paid, but he did not think he could in that way be reinstated and would not take his money until he knew more of the matter, or something to that effect. [illegible] Stainstop testified he [illegible] suspended him. He could not become reinstated without complying with the requirements of the order unless somebody with authority waived those requirements. And even were it to be found that Stainstop, as secretary and treasurer of the local order, received these dues at the time of the requested reinstatement, still there is no ground for claiming that it operated as a reinstatement. It is clear, whether Stainstop took the money or not, he advised deceased at the time that it was doubtful whether he would be reinstated and it must depend on the action of the superior officers of the company. National Benefit v. Stone, [illegible] Ind. [illegible]; Lancaster v The Protected Home Circle 146/111. Ap. 87.

The contract of insurance in this case, as is usual in such policies, included the constitution and by-laws of the society

~~as well as the certificate.~~ The certificate was offered in evidence by the plaintiff and treated as making a prima facie case. ~~It was necessary for the defendant to get in evidence the constitution and by-laws, and various notices and documents. Foreseeing this necessity, the~~ Defendant took the deposition of some of its superior officers and propounded various interrogatories as to books, documents and records, and copies of same that it wished to use in evidence. The plaintiff did not appear at the taking of the deposition, and objects here that a sufficient foundation was not laid for the introduction of the evidence. Before the trial the plaintiff moved to suppress the deposition. The court overruled the motion, but defendant stating in substance that it would rather re-take the deposition than have any question in the record about that, stipulated that no error should be assigned on the action of the court in overruling the motion to suppress. ~~The record therefore stands as though no such motion had been made.~~ The plaintiff, on the trial objected to various questions and answers and moved to strike out the evidence, ~~which objections and motions~~ would probably have been sustained as to some of the material proof if the evidence had been offered orally in court; but such objections to questions and interrogatories cannot prevail if first made on the trial. This is an old familiar rule and was applied in Hutchinson v Bambas 249 Ill. 624, where the proof was insufficient as to the loss of letters, the contents of which was offered in evidence. In I. C. R. R. Co. v Foulks, 191 Ill. 57, where the answer of the witness was improper as a statement of a conclusion instead of a statement of fact. In that case the court cited with approval Balkwill v Bridgeport Wood Finishing Co. 63 Ill. App. 625, where the rule was applied in case of insufficient evidence that a certain day was a legal holiday. In that case, citing T. W. & W. R. R. Co. v Dalleday, 54 Ill. 19, where, without stating the nature of the interrogatories and answers passed on,

[illegible] certificate. The certificate was offered in evidence by the plaintiff and treated as making a prima facie case. It was necessary for the defendant to rebut it, which he did by witnesses [illegible] and various letters and documents. Testimony [illegible] defendant took the deposition of some of the superior officers and propounded various interrogatories as to [illegible] and records, and asked [illegible] to use in evidence. The [illegible] of the deposition, and objects here that a sufficient foundation was not laid for the introduction of the evidence. Before the trial the plaintiff moved to suppress the deposition. The court overruled the motion, but defendant stating in substance that it would rather re-take the deposition than have any question in the record about that, stipulated that no error should be assigned on the act of the court in overruling the motion to suppress. The record therefore stands as though no such motion had been made. The plaintiff on the trial objected to various questions and answers and moved to strike out the evidence, which objections and motions would probably have been sustained as to some of the material proof if the evidence had been offered orally in court; but such objections to questions and interrogatories cannot prevail if first made on the trial. There is no [illegible] rule applied in Hutchinson v. Pooms, 44 Ill. 324, that the [illegible] insufficient as to the loss of letters, the contents of which was offered in evidence. In I. C. R. R. Co. v. Poulos, 181 Ill. 77, where the answer of the witness was in regard to a statement of a conclusion instead of a statement of fact, it was held that the [illegible] stated was no proper foundation. It was also held in Ill. Cent. R. R. Co. v. Cox, 145 Ill. 425, where the rule was applied in regard to insufficient evidence that a certain day was [illegible] in that case, citing C. B. & Q. R. R. Co. v. Dickey, 78 Ill. 267, [illegible]

the court said it is not the proper practice to make objections to depositions on the trial of the cause. They should be made and disposed of before the trial in order, if defective, the party taking them may have an opportunity to remedy the objection, and for such purpose ask a continuance. Statements that are objectionable merely because they are secondary evidence must be objected to before the trial. Cooke v Orne, 37 Ill. 188; 13 Cyc. 1020. It is of course true that certain objections to interrogatories and answers may prevail if first made on the trial, but we think the matter complained of in this case is substantially all within the rule that requires objections to be made before the trial. There is no reasonable presumption from the record before us that anything of the kind got in evidence that could not have been easily made competent by a re-taking of the ~~examin~~ deposition if the questions and answers had been held bad on the motion to suppress. We therefore will not discuss the questions raised here as to the competency of interrogatories and answers that should have been first raised on the taking of the deposition or on the motion to suppress.

Another defense attempted was that deceased made false warranties in his application as to his habit in the use of intoxicating liquors, and it is claimed that he came to his death because of intoxication. It appears that his widow, the beneficiary brought an action against saloon keepers under the dram shop act for causing his death. The record is not sufficiently abstracted on this question to fairly present it, and while the defendant discusses the question here, it does not clearly point out the parts of the record that he relies on. We regard the proof so clear on the other ground of defense that we have not examined this question.

Propositions of law were offered on the trial and marked held

the court said it is not the proper practice to make objections to depositions on the trial of the cause. They should be made preliminary to the trial in order, if defective, the party taking them may have an opportunity to remedy the objection, and for such purpose has a continuance. Statements that are objectionable merely because they are secondary evidence must be objected to before the trial. Cooke v Orme, 37 Ill. 188; Ib Oyo. 1060.

It is of course true that certain objections to interrogatories and answers may prevail if first made on the trial, but we think the matter complained of in this case is substantially all within the rule that requires objections to be made before the trial. There is no reasonable presumption from the record before us that anything of the kind got in evidence that could not have been easily made competent by a re-taking of the examination-in-chief if the questions and answers had been held bad on the motion to suppress. We therefore will not discuss the questions raised here as to the competency of interrogatories and answers that should have been first raised on the taking of the deposition or on the motion to suppress.

Another defense attempted was that deceased made false warranties in his application as to his habit in the use of intoxicating liquors, and it is claimed that he came to his death because of intoxication. It appears that his widow, the beneficiary brought an action against Nelson Barnes owner the dram shop for causing his death. The record is not sufficiently satisfactory on this question of fact to justify reversal. We, however, see the question here, it does not clearly point out the parts of the record that he relies on. We regard the proof as clear on the other ground of defense that we have not examined this question.

Propositions of law were offered on the trial and marked said

and refused by the court. We find nothing in the court's action in that regard indicating any view of the law less favorable to the plaintiff than we have before expressed. Finding no error in the record the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this day of_____in the year of our Lord one thousand nine hundred and_____

Clerk of the Appellate Court.

1806

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 208

R H Wm Apr 6/16

BE IT REMEMBERED, that afterwards, to-wit: on [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6199.

Dan. J. Curran, ~~et al~~ appellees.

vs Appeal from Knox.

J. H. Junk, appellant.

Carnes, J.

[Plaintiffs ~~A. [illegible] J. Curran and Alice O. Curran~~, were lawyers, and real estate brokers, doing business as Curran & Curran, at Moline Illinois, and were husband and wife. ~~They brought this action against J. H. Junk, the appellant, for commissions in procuring an exchange of his farm of 1280 acres in Minnesota for a livery stable property in Ottumwa, Iowa, belonging to Bosserman Brothers. On the trial, at the close of the evidence, the court, by agreement of counsel, instructed the jury if they found for the plaintiffs to assess damages at $3500.00. The verdict was for that sum. Judgment was entered thereon, from which this appeal is prosecuted.~~ sought to

The declaration consisted of the common counts with an additional count in the form of a common count alleging services rendered in exchange of real estate and personal property. The general issue was pleaded with special pleas alleging that pending the negotiations in the real estate deal in question there was an agreement entered into between the plaintiffs and defendant that the plaintiffs should effect the exchange of the property in question, and should further, within thirty days, procure an exchange of the Ottumwa property for farm lands in Rock Island County, Illinois; that the agreed compensation to plaintiffs for the whole matter was $3500.00 due when the whole transaction was completed and not before, and that plaintiffs had failed to procure the exchange for Rock Island County farm lands. It appeared in evidence that ~~appellant~~, he had never [illegible] ~~letter~~, wrote them on November 10, 1913, that he had two sections of land in Moore County, Minnesota, that he would like to exchange for ~~xxx~~ other property, and in the correspondence immediately fol-

The adjudication consisted of the common counts with an additional count in the form of a common count alleging services rendered in exchange of real estate and personal property. The general issue was pleaded with special pleas alleging that pending the negotiations in the real estate deal in question there was an agreement entered into between the plaintiffs and defendant that the plaintiffs should effect the exchange of the property in question, and should further, within thirty days, procure an exchange of the Ottawa property for farm lands in Rock Island County, Illinois; that the agreed compensation to plaintiffs for the whole matter was $2500.00 due when the whole transaction was completed and not before, and that plaintiffs had failed to procure the exchange for Rock Island County farm lands. It appeared in evidence that defendant, who had never met plaintiffs, wrote them on November 10, 1916, that he was the owner of land in Moore County, Minnesota, that he would like to exchange

lowing this letter he named a price of $100.00 per acre on his land, and ~~appellees~~ plaintiffs sent him a description of the livery stable property in Ottumwa, Iowa, valued at $75,000.00 to $100,000.00 that was in the market for such an exchange. After further correspondence ~~appellant~~ defendant concluded to go to Iowa and investigate the matter, and ~~appellees~~ plaintiffs wrote him on December 1, 1913, suggesting manner of meeting and taking the journey, and saying they would look to him for commissions at $5.00 per acre on his Minnesota land in case the deal was consummated. Dan Curran testified that on December 5, he had a telephone communication with ~~appellant~~ defendant in which he, ~~appellant~~ defendant, said the commission terms were satisfactory. Junk denied so saying, but Curran ~~was~~ was corroborated in his testimony by his wife who was in the room when he was talking over the telephone and stated what he said in the conversation. Arrangements were made for meeting the Iowa parties, and Dan. Curran went to Ottumwa and met ~~appellant~~ defendant and those parties at the Ballingall Hotel there December 6, 1913. They looked over the property and came home without affecting any bargain, but immediately thereafter ~~appellant~~ defendant wrote ~~appellees~~ plaintiffs that he had been considering the matter and a trade might be consummated if "you cut your commission in two making it $3000." Two or three days afterwards ~~appellant~~ defendant telephoned Dan. Curran to meet the Iowa parties at an hotel in Galesburg, Illinois, and on December 9 they all met at that place. After considerable negotiation an article of agreement was that day prepared and signed, stating the proposed terms of the ~~trxxxxxtion~~ transfer and giving each party a stated time to examine the other's property and approve the contract. December 11, ~~appellant~~ defendant and Dan Curran again went to Ottumwa, Iowa, where there were further negotoations. They returned home, and on December 17 ~~appellant~~ defendant wrote ~~appellees~~ plaintiffs offering to approve the agreement if ~~appellees~~ plaintiffs would take as commissions $1000.00 when the deal was closed, $1000.00 when they disposed of the personal property, and $1000.00

when they should dispose of the Ottumwa real estate. ~~Appellees~~ Plaintiffs answered this letter under the same date, discussing the past transaction at length, referring to the terms as to commissions first proposed, and refusing to vary them. ~~Appellant~~ Defendant answered the next day by letter, saying ~~that~~ the commission was too much and that he would not go on with the transaction. A day or two thereafter ~~Appellees~~ plaintiffs wrote him enclosing a letter from an Iowa party who was talking about buying the Iowa property, and shortly afterwards Dan Curran met ~~appellant~~ defendant at an hotel in Galesburg, Illinois, and Curran said they then again discussed the matter of commission and ~~appellant~~ defendant asked if they would charge a further commission for disposing of the Iowa property. He told him they would, and that ~~appellant~~ defendant said to go ahead with it, he would pay the commissions all right. Afterwards, January 19, 1914, the parties again met at Ottumwa Iowa, and closed the trade. Curran testified that Junk there again, before the trade was closed, told him he would pay the commissions if the deal went through. On their way home ~~appellant~~ defendant paid Curran $500.00 to apply on commissions. ~~Appellees~~ Plaintiffs were endeavoring to dispose of the Iowa property for ~~appellant~~ defendant, and there was some correspondence about that. They wrote ~~appellant~~ defendant letters on February 7, March 4, March 24, and April 11 demanding further payment on commissions, which met no response and no claim that no commission was due, though Junk did write them on March 28 urging them to do something about the sale of the Iowa property.

There ~~is~~ was no claim that ~~appellees~~ plaintiffs did not work fairly and faithfully for ~~appellant~~ defendant, or that there was any fraud or wrong or loss in the transaction, but ~~appellant~~ defendant testified denying any agreement to pay the original commission charged, and saying that at the time the trade was consummated there was an agreement between him and Dan Curran at the hotel in Ottumwa that ~~appellees~~ should trade him in and trade him out of the property for $3500.00

when they should dispose of the Ottawa real estate, Appellant answered this letter under the same date, discussing the real transaction at length, referring to the terms as to commissions first proposed, and refusing to vary them. Appellant answered the next day by letter, saying that the commission was too much and he would not go on with the transaction. A day or two thereafter Appellant wrote him enclosing a letter from an Iowa party who was talking about buying the Iowa property, and shortly after Frank Dan Curran met Appellant at an hotel in Galesburg Illinois, and Curran says they then again discussed the matter of commission and Appellant asked if they really charge a further commission for disposing of the Iowa property. He told him they would, and that Appellant said to go ahead with it, he would pay the commissions all right. Afterwards, January 19, 1914, the parties meeting at Ottawa Iowa, and closed the trade. Curran testifies that then again, before the trade was closed, told him he would pay the commissions if it was ever brought. On their way home Appellant paid Curran $500.00 to apply on commissions. Appellant were endeavoring to dispose of the Iowa property for themselves. (See also the correspondence among them). They write Appellant letters on February 7, March 4, March 24, and April 11 demanding further payment on commissions, which met no response and no claim that no commission was due, though Curran did write them on March 28 urging them to do something about the sale of the Iowa property.

There is no claim that Appellants did not work fairly and faithfully for Appellant, or that there was any fraud or wrong or loss in the transaction, but Appellant testified demanding any agreement to pay the original commission charged, and saying that at the time the trade was consummated there was an agreement between him and Dan Curran at the hotel in Ottawa that Appellant

and that nothing should be paid until the whole transaction was complete. His testimony differs from his plea in not confining the trading out to trade for Rock Island County lands.

This left a sharply contested question of fact for the jury to determine. We conclude, from a reading of the evidence in the record, that the jury were not only justified in finding that Curran's original proposition of $5.00 an acre as commission was accepted by appellant, but they could not reasonably reach a different conclusion. The question still remains whether different terms were agreed upon as testified by appellant at the hotel in Iowa on the day the contract was completed. The testimony of appellant is very clear that there was, and of Dan Curran equally clear that there was not. The fact that appellant immediately after that meeting paid Curran $500.00 to apply on commissions certainly does not support his theory that no commissions were to be paid until the Iowa property was disposed of, and his failure to answer subsequent letters from appellees demanding further payment on commissions by claiming that no commissions were due, seems inconsistent with the claim he is now making. We are entirely satisfied with the verdict of the jury on that question, therefore the judgment should stand unless the record discloses material error of law.

Error ~~is~~ assigned on giving, refusing and modifying instructions. Plaintiffs' second given instruction informed the jury that the burden of proof was upon the plaintiffs to show a contract for commissions and that the contract, if so shown, stands until a recision or change is shown, and that the burden of proof is upon defendant to show a recision or change. ~~We see no substantial objection to this instruction, but if there is any uncertainty about it it is remedied by the plaintiffs third given instruction in which~~ the jury ~~were told~~ told if they believed from a preponderance

and that nothing would be paid until the whole transaction was complete. His testimony differs from his plea in not confining the trading out to trade for Rock Island County lands.

This left a sharply contested question of fact for the jury to determine. We conclude, from a reading of the evidence in the record, that the jury were not only justified in finding that defendants original proposition of $5.00 an acre as commission was accepted by appellant, but they could not reasonably reach a different conclusion. The question still remains whether different terms were agreed upon as testified by appellant at the hotel in Iowa on the day the contract was completed. The testimony of appellant is very clear that there was, and of Dan Curran [illegible] clear that there was not. The fact that appellant immediately after that meeting said Curran ($500.00 to apply on commissions certainly does not support his theory that no commissions were to be paid until the Iowa property was disposed of, and his [illegible] further payment on commissions by claiming that no commissions were due, seems inconsistent with the claim he is now making. [illegible] the jury on the question. Therefore the judgment should stand unless the record discloses material error of law.

Error is assigned on giving, refusing and modifying instructions. Plaintiff's second given instruction informed the jury that the burden of proof was upon the plaintiffs to show a contract for commissions and that the contract, if so shown, stands until a rescission or change is shown, and that the burden of proof is upon defendant to show a rescission or change. [illegible] [illegible] it is remedied by the plaintiffs third given instruction [illegible] the jury were told if they believed from a preponderance

of all the evidence the facts (reciting them) claimed by the plaintiffs, then, unless they further believed from a preponderance of all the evidence that the contract with reference to commissions was rescinded or changed by the consent of both the parties thereto, they should find for the plaintiffs. By the next instruction they were told, in substance, if the original contract relied on was proved by a preponderance of the evidence and the ~~exxxxxtiss~~ properties were afterwards exchanged by the defendants through the plaintiffs as real estate brokers under the terms of the agreement entered into with reference to commissions, then the plaintiffs are entitled to recover "unless you believe from a preponderance of allthe evidence in the case that the said contract was afterwards mutually rescinded or changed."

By defendant's first given instruction the jury were told that if they believed the parties had a contract for commissions still, as matter of law, there was nothing to prevent them from making a new and different contract at a different time, and if they believed from a preponderance of the evidence that they did make a new or another or differentcontract in respect to commissions, then the new contract would take the place of the first or original contract. ~~This instruction very fairly presented to the jury the controverted question.~~ ~~Appellant~~ Defendant offered other instructions ~~which amounted only to an amplification of the rule that the court had stated to the jury about a subsequent different contract,~~ stating in detail if they believed there was an agreement between plaintiffs and defendant to trade the Iowa property for farm lands in Rock Island County, Illinois, "or elsewhere" and the undertaking was not performed by the plaintiffs, then they could not recover. The court struck out the words "or elsewhere" and this action ~~is~~ was defended by ~~appellees~~ plaintiffs on the ground that it was a departure from the pleadings to instruct the jury that there was an agreement to exchange for lands elsewhere than in

of all the evidence the jury (resulting them) claimed by the plaintiffs, then, unless they further believed from a preponderance of all the evidence that the contract with reference to commissions was rescinded or changed by the consent of both the parties thereto, they should find for the plaintiffs. By the last instruction they were told, in substance, if the original contract relied on was proved by a preponderance of the evidence and the properties were discovered and sold by the defendants through the plaintiffs, as real estate brokers under the terms of the agreement entered into with reference to commissions, then the plaintiffs are entitled to recover "unless you believe from a preponderance of all the evidence, in the case that the said contract was effectively rescinded or changed."

By defendant's first given instruction the jury were told that if they believed the parties had a contract for commissions still, as matter of law, there was nothing to prevent them from making a new and different contract at a different time, and if they believed from a preponderance of the evidence that they did make a new or another or differentcontract in respect to commissions, then the new contract would take the place of the first or original contract. This instruction was properly refused in the plaintiffs' rescinded contract. A mere offer of commissions with respect only to the properties mentioned in the original contract is not sufficient to prove a rescission. The defendant should have requested a peremptory instruction, stating in detail if they believed there was an agreement between plaintiffs and defendant to trade the Iowa property for farm lands in Rock Island County, Illinois, "or this that" and the undertaking was not performed by the plaintiffs, then they should not recover. The court struck out the words "or elsewhere" and the motion to direct a verdict by ~~[illegible]~~ on the ground that it was a departure from the pleadings to instruct the jury that

Rock Island County. We do not think this motion of the court is justified on that ground because if they did make a later and different agreement we presume it was admissible, under the general issue. But be that as it may, the jury had been several times clearly and definitely told that if there was a later and different agreement made the plaintiffs could not recover, and it was entirely unnecessary to give these instructions, and consequently not reversible error to so modify them. The court refused other instructions offered by the defendant which we have examined and regard properly refused. There were no difficult questions of law involved, and insofar as it was necessary to advise the jury about the law governing the subject, the instructions given fully served the purpose.

The motion for a new trial was accompanied by an affidavit setting up newly discovered evidence, but not the affidavit of the witness whose evidence had been discovered. A motion for a new trial founded on newly discovered testimony should be supported by the affidavits of the witnesses by whom it is proposed to prove the facts relied upon, or some excuse should be shown for not obtaining them. Janeway v Burton, 201 Ill. 78. But aside from this there was nothing of importance in the newly discovered evidence.

There is no question about the amount of the verdict. As we have before said, the jury, by agreement of counsel, were instructed if they found for the plaintiffs to render a verdict for that amount, therefore, if they found anything was due from the defendant to the plaintiffs they had no choice but to adopt those figures, and neither party could complain. The judgment is affirmed.

Affirmed.

[illegible] County. [illegible] satisfied in that [illegible] a [illegible] agreement presumes it - reasonable, under the [illegible] circumstances. But be that as it may, the jury had given several times clearly and definitely told that if there was a later and different agreement made the plaintiffs could not recover, and it was entirely unnecessary to give more instructions, and certainly not reversible error to so modify them. The court refused other instructions offered by the defendant which we have examined and regard properly refused. There were no difficult questions of law involved, and inasmuch as it was necessary to advise the jury about the law governing the subject, the instructions given fully served the purpose.

The motion for a new trial was accompanied by an affidavit setting up newly discovered evidence, but not the affidavit of the witness whose evidence had been discovered. A motion for a new trial founded on newly discovered testimony should be supported by the affidavits of the witnesses by whom it is proposed to prove the facts relied upon, or some excuse should be shown [illegible] Dreskey v Kirkman, 60 Ind. 71. But aside from this there was nothing of importance in the newly discovered evidence.

There is no question about the amount of the verdict. As we have before said, the jury, by agreement of counsel, were instructed if they found for the plaintiffs to render a verdict for that amount, therefore, if they found anything was due from the defendant to the plaintiffs they had no choice but to accept those figures, [illegible] the amount is different.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

Clerk of the Appellate Court.

620

1810

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 224

BE IT REMEMBERED, that afterwards, to-wit: on FEB 8 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6308.

City of Peoria, appellee

vs Appeal from Peoria.

Western Union Telegraph Co.

appellant.

Carnes, J.

This is an action by appellee against the Western Union Telegraph Company, of the same kind and character as its suit against the Postal Telegraph-Cable Company, in which we file an opinion herewith. (Gen. No. 6207) The same counsel present the case here, and practically the same questions are raised and argued. For the reasons stated in the opinion in that case the judgment is affirmed.

AFFIRMED.

Niehaus J. took no part.

No. 6802.

City of Peoria, appellee

vs

Appeal from Peoria.

Western Union Telegraph Co.

appellant.

Opinion filed

This is an action by appellee against the Western Union Telegraph Company, of to have filed and stenographer in its employ contract the Postal Telegraph-Cable Company, in which the filing of opinion I herein. (Opn. No. 6807) The same somewhat on each the case here, and particularly the and questions are raised and argued. For the reasons stated in the opinion in that case the judgment in a filmed.

Affirmed.

Transcribed. book no page.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

610

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 214

R H Dru Apr 6. 1916

BE IT REMEMBERED, that afterwards, to-wit: on FEB 8 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6109.

John H. Gibson, appellee.

vs Appeal from City Court Sterling.

Frank L. Pitney, appellant.

Niehaus, J.

~~In this case, the appellant Frank L. Pitney~~ Defendant, entered into a written contract with ~~appellee, John H. Gibson,~~ Plaintiff, on the 28th, of June 1913, by which the ~~appellant~~ Defendant agreed to convey to the ~~appellee~~ Plaintiff, by warranty deed, a farm, with a dwelling house thereon, in the county of Whiteside, in consideration of the payment by ~~appellee~~ Plaintiff of $18,000 as follows; $300 cash in hand; $1100 in a note made by J. W. McCready, to be endorsed over to ~~appellant~~ Defendant; and the balance of the consideration to be settled by ~~appellee~~ Plaintiff, at the time of the delivery of the deed to him, on March 1st, 1914, by making a further payment of $3700 and by giving another mortgage on the premises, for $4875, with interest at 5% per annum. It was expressly agreed, in the contract, that ~~appellant~~ Defendant would deliver to ~~appellee~~ Plaintiff a warranty deed, and give him possession of the premises on March 1st. 1914; the premises to be as good condition as they were at the date of the contract, ordinary wear and tear excepted.

At about the date fixed by the contract for the delivery of the deed and the possession, ~~appellee~~ Plaintiff went to ~~appellant~~ Defendant, who was cashier of the First National Bank, at Sterling, Illinois, and demanded of ~~appellant~~ Defendant, that he carry out the terms of the contract, by delivering to him the deed and the possession of the premises; and offered to perform his part of the contract, by paying the $3700 which he had drawn from the Sterling National Bank, and had in his possession for that purpose; and by delivering to ~~appellant~~ Defendant, the notes and mortgage for the settlement of $4875, as required by the terms of the contract. The evidence shows that ~~appellant~~

No. 4[illegible].

[illegible] Division, [illegible]

vs

[illegible] - from City Court [illegible].

[illegible] - Plaintiff's [illegible].

[illegible], J.

In this case [illegible] Thomas [illegible] Stevens, entered into a [illegible] contract [illegible] John R. Hudson, on the 10th, of June 1917, [illegible] agreed to convey to the [illegible], by warranty deed, a farm, with a dwelling house thereon, in the county of Whitside, in consideration of the sum of [illegible] of $12,000 as follows: $800 down in hand; $1000 [illegible] note made by J. W. McCready, to be endorsed over to [illegible]; [illegible] balance of the consideration to be settled by [illegible], [illegible] time of the delivery of the deed to him, on March 1st, 1918; by making a further payment of $2700 and by giving another mortgage on the premises, for $8000, with interest at 8% per annum. It was expressly agreed, in the contract, that [illegible] could deliver to [illegible] a warranty deed, and give him possession of the premises on March 1st, 1918; the premises to be in good condition as they were at the date of the contract, ordinary wear and tear excepted.

About the date fixed by the contract for the delivery of the deed and the possession, [illegible] went [illegible], the cashier of the First National Bank, of Franklin, Illinois, and [illegible] of [illegible], that he carry out the terms of the contract, by delivering to him the deed and the possession of the premises; and offered to perform his part of the contract, by paying the $1000 which he had drawn from the Franklin National Bank, and had [illegible] possession for that purpose; and by delivering to [illegible] the note and mortgage for the settlement of $8000, as required

was ready to deliver the warranty deed, but practically admitted that he could not carry out his agreement in regard to giving ~~appellee~~ plaintiff possession; and it appears from his own testimony, that he proposed to obtain for ~~appellee~~ plaintiff some other dwelling house to occupy, until he could put him in possession of the dwelling house on the premises in question; which offer ~~appellee~~ plaintiff refused to accept; and thereupon the ~~appellee~~ plaintiff declared the contract at an end, and demanded a return of the part of the consideration which had been paid to ~~appellant~~ defendant; ~~appellant~~ defendant refused, and ~~appellee~~ plaintiff commenced this suit to recover the sum paid.

The trial resulted in a verdict in favor of appellee, for $1034.65, which was the amount received by appellant, and legal interest; the court rendered judgment on the verdict. Then upon an appeal was taken; and it was urged by the ~~appellant~~ defendant that under the facts presented in evidence, ~~appellee~~ plaintiff had no right to recover; and that the evidence failed to show, that ~~appellee~~ plaintiff tendered performance on his part, or a willingness and ability to perform; or that the actual performance of this contract, which was mutual in its character, was prevented by the ~~appellant~~ defendant.

We think the evidence clearly shows, that appellee offered to perform his part of the contract in good faith, and that he had, at the time, the ability to perform it; that he had the $3700 in money ready for final payment; and the notes and mortgage for the balance of the purchase price, in accordance with the terms of the contract. Appellant admitted his inability to carry out the provisions of his contract, requiring him to turn over the possession of the premises on March 1st, 1914, by proposing to procure for appellee another dwelling place. There was evidence tending to show, that the premises were not in as good condition at the time of the making of the contract; that the dwelling house was quarantined, owing to the presence of small-

pox; that water pipes had been frozen, and were bursted, and had dampened some of the plastered walls of the house, and had caused some of the plastering to fall; and that because of the bursting of the water pipes, there was several feet of water in the cellar or basement of the house, which made it very unsanitary. Under the circumstances related, the appellee had the right to rescind the contract, and recover back the consideration which had then paid by him.

"It is a familiar principle that at law the time fixed for the performance of a contract is deemed the essence of the contract; and generally, if the seller is not ready and able to perform his part of the agreement, on the day, the purchaser may elect to consider the contract at an end." Morgan v Herrick Admr. 21 Ill. 481; Tyler v Young, 2nd. Scam. 444. The same principle was upheld by our Supreme Court in the case of Guerdon v Corbett, 87 Ill. 274; Wilson v Bauman, 80 Ill. 493, and Bonnettv Glattfeldt, 130 Ill. 175. And this court held, in the case of Bernhardt v Trimble, 45 Ill. App. 59, that where a party fails or refuses to comply with the terms of a contract, the other party may rescind and refuse performance on his part. The facts and circumstances in evidence, clearly indicate that appellant was not in position, for a long time after March 1st. 1914, to carry out the terms of his contract; that at the time required by his contract, he was not able to turn over to appellee, the possession of the premises; and that the premises were not in good habitable condition or sanitary condition, nor in the condition of repair required by the contract; and that appellee, who was able and willing to perform, and offered to perform his part of the contract, had a right, therefore, to rescind it; and to demand a return of the amount of the consideration which appellant had received from him; and that upon appellant's refusal to return the consideration, had the legal right to sue for

and recover the amount due him, in an action of assumpsit.

The judgment should therefore be affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6125

/615

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 247

BE IT REMEMBERED, that afterwards, to-wit: on FEB 8 15 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen.No. 6132

Anna Koepke, Admrx. &c. appellee.

vs Appeal from Rock Island.

C. R. I. & Pa. Ry. Co. appellant.

Mishaus, J.

This was an action on the case commenced in the circuit court of Rock Island County, by the appellee, Ann Koepke, Administratrix of the estate of her husband Herman Koepke, deceased, against the C. R. I. & P. Ry. Company, appellant, for negligently causing the death of her husband, who was an employe of appellant. It ~~is~~ was alleged in the declaration, that the deceased was killed while engaged as Car Inspector's helper, in the line of his duty, by the negligence of ~~appellant's~~ defendant's servants; and the liability of ~~appellant~~ defendant ~~is~~ was based upon the provisions of the Federal Act relating to the liability of common carriers engaged in interstate business, to their employes.

The negligence charged, ~~is~~ was that the ~~appellant~~ defendant, by its servants, so negligently managed a switch engine and the switching which was done by ~~appellant's~~ defendant's servants in connection with the distribution of a string of cars, around some of which the deceased was employed; also that ~~appellant's~~ defendant's servants, who were managing the switching and the switch engine, at the time in question, did not exercise reasonable care to ascertain whether the deceased was endangered by their work, nor give him any warning of the danger incurred; and that ~~appellant's~~ defendant's servants negligently failed to set the brakes of the string of cars in question, and that thereby they got into motion, unexpectedly, and ran into the deceased.

There was a trial by jury, which resulted in a verdict finding the appellant guilty, and assessing the damages in the sum of $7200; and the damages were apportioned equally between Anna Koepke

Hon. Jno. Hice

Hon. Joseph, Judge, &c. presiding.

vs. Appeal from Rock Island.

[illegible]

Thursday, P.

This was an action on the case commenced in the circuit court of Rock Island County, by the appellee, Ann Cooper, administratrix of the estate of her husband [illegible], against the C. R. I. & P. Ry. Company, appellant, for negligently causing the death of the intestate, [illegible] by negligence. It is averred in the declaration, that the deceased was killed while engaged as the Company's fireman, in the [illegible] of his duty, by the negligence of appellant's servants; and the liability of appellant is based upon the provisions of the Statute, relating to the liability of common carriers engaged in interstate business, [illegible].

The negligence charged, was that the appellant, by its servants, so negligently managed a switch engine and the switching [illegible] was done by appellant's servants in connection with the distribution of a string of cars, around some of which the deceased was employed; also that appellant's servants, who were managing the switching and the switch engine, at the time in question, did not exercise reasonable care to ascertain whether the deceased was endangered by their work, nor give him any warning of the danger if [illegible]; and that appellant's servants negligently failed to set the brakes of the string of cars in question, and that thereby they got into motion, unexpectedly, and ran into the deceased.

There was a trial by jury, which resulted in a verdict finding the appellant guilty, and assessing the damages in the sum of $[illegible]; and the judgment was accordingly entered against [illegible]

the widow, and Helen Koepke, the only child of the deceased. And the jury made a special finding to the effect that the total amount of damages suffered was $8000. and that they deducted $800 therefrom for contributory negligence of which they found the deceased guilty. Judgment was rendered on the verdict, and upon appeal, it is attacked principally on the ground that the cause of the death of ~~appellants~~ plaintiffs intestate was a part of the risk and danger assumed by him, by his contract of employment; that the damages ~~are~~ were excessive; and that the jury who found that the ~~appellees~~ plaintiffs intestate was guilty of contributory negligence, did not deduct a sufficiently large proportion from the whole amount of damages found, on account of such contributory negligence.

The proof showed, that the deceased, in the early morning hours of the day of the accident which resulted in his death, was engaged in work pertaining to his employment, as helper or assistant to the car inspector in ~~appellants'~~ defendants' railroad yards; the yards being situated opposite to, and north of the passenger station at Rock Island. At the time mentioned, there was a string of three mail cars and four passenger coaches, standing on the side track designated as number 3, which was the fourth track north of the station. These cars and coaches, in the regular course of ~~appellants'~~ defendants' passenger service, were to be inspected and distributed among various trains to which they were to be attached. The deceased was assisting in inspecting and getting one of this string of cars mentioned, a mail car, ready to be switched and attached to ~~appellants'~~ defendants' passenger train No. 29, which was bound for Kansas City, Missouri; he had just helped to couple this mail car to the road engine, which was ready to switch the car to train No. 29 and the engine had moved it about 4 or 6 feet from the other cars, that had been left standing on the track. After the mail car had been coupled to the road engine, the deceased began the work of testing the wheels or other metal parts of the mail car, and the

the widow, and Helen Koepke, the only child of the deceased. And the jury made a special finding to the effect that the total amount of damages suffered was $8000. and that they assessed $800 thereof as contributory negligence which they found to be present, [illegible] the [illegible] verdict, was [illegible] it is argued primarily on the ground that the cause of the death of [illegible] immediate was a part of the risk and danger assumed by him, by his contract of employment; that the damage was exclusively; and that the jury who found that the [illegible] indebtedness was guilty of contributory negligence, did not deduct a sufficiently large proportion from the whole amount of damages found, on account of such contributory negligence.

The facts show, that the decedent, in his duty [illegible] hours of the day of the accident which resulted in his death, was engaged in work pertaining to his employment, as helper on watchman to the car inspector in [illegible]'s railroad yards; the yards situated opposite to, and north of the passenger station in Rock Island. At the time mentioned, there was a string of three mail cars and four passenger coaches, standing on the side track designated as number 3, which was the fourth track north of the station. These cars and coaches, in the regular course of [illegible] passenger service, were to be inspected and distributed among various trains to which they were to be attached. The decedent was assisting in inspecting and setting one of that train of cars mentioned, a mail car, ready to be switched and attached to a [illegible] passenger train No. 88, which was bound for Kansas City, Missouri; he had just helped to couple this mail car to the road engine, which was ready to attach the car to train No. 88 [illegible] the engine had moved it about 4 or 5 feet from the other cars, that had been left standing on the track. [illegible] he had been coupled to the road engine, the deceased began the work of

click of the hammer which he was using for that purpose, had been heard just immediately before he was killed. At this time, another switching crew was operating at the other, or easterly end of the string of cars, and coaches mentioned, nearly two blocks away, for the purpose of detaching two coaches therefrom.

~~The evidence justifies the inference, that~~ During the operation of "cutting off" the coaches inquestion, at the east end, the switch engine, which was doing the work, ~~must have~~ bumped against or pushed the standing cars, ~~with unusual violence or force, and~~ ~~that~~ ~~it was in consequence of such unusual force, that~~ and the whole body of the remaining cars ~~suddenly~~ moved towards the car at which the ~~appellee's~~ deceased's intestate was working, who apparently did not notice the approach of these cars, and was caught between the buffers of the approaching cars, and the car around which he was at work.

~~It is clear that~~ The setting of the string of cars in motion was the result of the action of the switching crew, at the east end, and was an unusual occurrence, and therefore unexpected; ~~it is evident also, that~~ A proper and usual prosecution of the switching operation, of "cutting off" these coaches, would not have resulted in setting the remainder of this string of coaches and cars in motion. ~~If the setting of the cars in motion was an extraordinary or unusual incident in the work of switching, it is clear, that the deceased did not assume the risk and danger thereof; it was only the ordinary and usual risks and dangers of his employment, which he had assumed. And if the accident was caused by the act of the engineer of the switch engine, in striking the body of the cars in question, with extraordinary and unnecessary force and violence, and such force and violence caused the string of cars to be set in motion, and the deceased was thereby killed, such act would amount to negligence, and the~~

which of the hammer which he was using for that purpose, had been [illegible] switching crew was operating at the other, or eastwardly end of the string of cars, an coaches mentioned, nearly two blocks away, for the purpose of detaching two coaches therefrom.

[illegible] of "cutting off" the coaches impossible, at the east end, the switch engine, which was doing the work, [illegible] bumped against or pushed the standing cars, [illegible] the whole body of the standing cars [illegible] moved towards the car at which the [illegible] intestate was working, who apparently did not notice the approach of these cars, and was caught between the buffers of the approaching cars, and the car around which he was at work.

It is clear that the setting of the string of cars in motion was the result of the action of the switching crew, at the east end, [illegible] without [illegible] [illegible] it is evident also, that a proper and usual prosecution of the switching operation, of "cutting off" these coaches, would not have resulted in setting the remainder of this string of coaches and cars in motion. If the setting of the cars in motion was an extraordinary or unusual [illegible] in the [illegible] switching, it is clear, that the deceased did not assume the risk and danger thereof; it was only the ordinary and usual risks and dangers of his employment, which he had assumed. And if the accident was caused by the act of the engineer of the switch engine, in striking the body of the cars in question, with extraordinary and unnecessary force and violence, and such force and violence [illegible] the [illegible] of cars to be set in motion, and the deceased was [illegible] killed, was not usual or ordinary, and the

deceased did not assume the risks and dangers of such negligence. Devine v C. R. I. & P. Ry. Co. 185 Ill. App. 488; affirmed in 366 Ill. 248; Mattocks v C. & A. Ry. Co. 187 Ill. App. 529; Mondou v N. Y. N. H. Ry. Co. 223 U. S. 1; C. & E. I. Ry. Co. v White, 209 Ill.124. Nor does the law impose a duty upon one to anticipate the negligence of others. It is a presumption of law, that every person will properly perform the duty, which is enjoined upon him by law or imposed by contract. McFarland v Jackson 189 Ill. App. 453.

It is hardly necessary for the purpose of this decision to discuss at length, the question, whether or not the deceased was guilty of contributory negligence, by being on the railroad track, and between the mail car and the remaining string of cars, at the time he was killed. But a proper determination of that question, would involve taking into consideration at least two elements, namely, whether the deceased, at the place where he was killed, was performing the duties of his employment; and, whether he could, by the exercise of due care, have anticipated or noticed the approach of the cars moving towards him. There is no direct evidence to throw any positive light upon these inquiries; it may properly be emphasized, however, that there is also no evidence from which the inference could be justly drawn, that the deceased was not, at the time he was killed, acting in the line of his employment; and from the nature of his employment, the mere fact of his being on the track, and between the cars, would not, of itself, be negligence. Whether, as a matter of fact, the appellant was guilty of the negligence charged, and whether or not the deceased was guilty of contributory negligence, were questions for the jury to determine from the evidence. (Tulo v O'Gara Coal Co. 183 Ill. App. 483; Devine v C. R. I. & P. Ry. Co. supra.)

The matter of contributory negligence, under the Federal Liability Act, does not bar the right of recovery, but simply

deceased did not assume the risks and dangers of such negligence.

Davies v. C. R. I. & P. Ry. Co., 185 Ill. App. 489; affirmed in 282 Ill. 242; Mattocks v. C. & A. Ry. Co. 187 Ill. App. 329; Monson v. Chi. & N. Ry. Co. 211 Ill. App. 3; Ill. C. R. R. Co. v. Cluff, 175 Ill.124. Nor does the law impose a duty upon one to anticipate the negligence of others. It is a presumption of law, that every person will properly perform the duty, which is enjoined upon him by law or imposed by contract. Wolfrland v Jackson 189 Ill. App. 182.

It is hardly necessary for the purpose of this decision to discuss at length, the question, whether or not the deceased was guilty of contributory negligence, by being on the railroad track, and between the mail car and the remaining string of cars, at the time he was killed. But a proper determination of that question, would involve taking into consideration at least two elements, namely, whether the deceased, at the place where he was killed, was performing the duties of his employment; and, whether he could, by the exercise of due care, have anticipated or noticed the approach of the cars moving towards him. There is no direct evidence to throw any positive light upon these inquiries; it may properly be emphasized, however, that there is also no evidence from which the inference could be justly drawn, that the deceased was not, at the time he was killed, acting in the line of his employment; and from the nature of his employment, the mere fact of his being on the track, and between the cars, would not, of itself, be negligence. Whether, as a matter of fact, the appellant was guilty of the negligence charged, and whether or not the deceased was guilty of contributory negligence, were questions for the jury to determine from the evidence. (Tuck v. O'Hara Coal Co. 185 Ill. App. 432; Davies v C. R. I. & P. Ry. Co. supra.)

The matter of contributory negligence, under the Federal Liability Act, does not bar the right of recovery, but simply

affects the amount of damages which may be recovered; and under this act, damages are to be diminished by the jury, in proportion to the amount of negligence attributable to the employe. If the deceased was really guilty of contributory negligence, it must have been regarded by the jury as slight; but the extent of such contributory negligence, and the proportionate diminishing of damages, in consequence thereof, were questions for the jury to determine; and we cannot say, that the jury improperly determined either the question of contributory negligence of the deceased, or the amount to be allowed therefor in diminution of damages. We donot regard the amount of the damages allowed as excessive, under the facts and circumstances presented by the evidence; nor were the damages improperly adjusted between the parties to whom they accrued.

There is no substantial error, either in the verdict of the jury, or the judgment of the Court. The judgment is therefore affirmed.

Affirmed.

adjudge the amount of damages which may be recovered; and under this act, damages are to be minimized by the jury, in proportion to the amount of negligence attributable to the original. If the deceased was really guilty of contributory negligence, it must have been required by the jury as right; but the extent of such contributory negligence, and the proportionate diminishing of damages, in consequence thereof, are questions for the jury to determine; and we cannot say, that the jury improperly determined either the question of contributory negligence of the deceased, or the amount to be allowed thereafter in diminution of damages. We cannot say on the amount of the damages allowed as excessive, under the facts and circumstances presented by the evidence; nor were the damages improperly apportioned between the parties to whom they accrued.

There is no substantial error, either in the verdict of the jury, or the judgment of the Court. The judgment is therefore affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____.

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 230

BE IT REMEMBERED, that afterwards, to-wit: on APR 14 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6150.

The People ex rel John Britt,

appellee

vs Appeal from Stephenson.

School Directors etc. appellant.

Dibell, P. J.

~~On November 7, 1914,~~ John Britt, ~~as relator filed in the circuit court of Stephenson County a petition~~ petition against the school directors of District No. ~~eighty nine~~ 89 in Stephenson county, respondents, to require said directors to approve the selection made by him of the Freeport high school in district no. ~~one~~ 145 ~~hundred and forty nine five~~ in the same town for his son, John J. Britt, and to pay the tuition incurred and to be incurred for the attendance of said child at said high school during the current school year. The petition alleged that Britt was a resident and tax payer of said district No. ~~eighty nine~~ 89 and was the father of said child and that said child was within the school age and lived with him and that he was responsible for the care, nurture and education of said child; and said petition set up the statute of 1913, entitled "An act to provide for high school privileges for graduates of the eighth grade," The petition alleged that district No. one hundred and forty five ~~lies~~ lay south of and contiguous to said district No. eighty nine and has a high school therein and affords the nearest and most convenient high school accessible to pupils of district No. eighty nine which offers a full four years program of study, and ~~is~~ was the only high school in said county with such program accessible to pupils of district ~~xixx~~ eighty nine; that relator selected said high school for the attendance of his child and obtained the consent of the school board of said high school for the admission of

Sup. Ct. Minn.

[illegible]

appellee

vs. Appeal from Stephenson.

School Directors etc. [illegible]

Dibell, P. J.

On November 7, 1904, John Britt as relator filed in the district court of Stephenson County a petition against the school directors of District No. [illegible] in Stephenson County, to require said directors to approve the selection made by him of the Freeport High school in district no. one hundred and forty nine five in the same town for his son, John J. Britt, and to pay the tuition incurred and to be incurred for the attendance of said child at said high school during the current school year. The petition alleges that Britt was a resident and tax payer of said district No. eighty nine and was the father of said child and that said child was within the school age and lived with him and that he was responsible for the care, nurture and education of said child; and said petition set up the statute of 1903, entitled "An act to provide for high school privileges for graduates of the eighth grade." The petition alleged that district No. one hundred and forty five ~~five~~ south of and contiguous to said district No. eighty nine and had a high school therein and afforded the nearest and most convenient high school accessible to pupils of district No. eighty nine which school had full four years program of study, and was the only high school in said county with such program accessible to pupils of district ~~nine~~ eighty nine; that relator selected said high school for the attendance of his child and obtained the consent of the school board of said high school for the admission of

said child; that said child ~~is~~ was a graduate of the eighth grade in said district eighty nine; that the tuition per capita of said high school ~~is~~ was forty dollars per year, payable semi-annually in advance, and ~~does~~ did not exceed the per capita cost of maintaining said high school; that there ~~are~~ were ample funds in the hands of the treasurer of district No. eighty nine, and ~~were~~ there sufficient funds in his hands on July 1, 1914 to pay such tuition, specifying the amounts, and in addition thereto said district No. eighty nine levied a tax of five hundred dollars for the general expenses of said district for the current year, and that after paying said expenses there will remain a sum in the hands of the treasurer; that though often requested the directors of district No. eighty nine refused to grant the transfer of said child, refused to approve the selection of said high school, and refused to pay the tuition charged relator for the attendance of said child at said high school and did this without making any objections to the selection and without designating any other high school. The directors answered, admitting many facts and denying some of the facts alleged, and stating what sums they had contracted to pay during the said school year, and that on July 29, 1914, they levied a tax of five hundred dollars for school purposes for the ensuing year, and that they appropriated said five hundred dollars for certain specified purposes, namely, for salary of teachers four hundred dollars, for fuel fifty dollars, for painting school house forty dollars for incidental expenses ten dollars, and that said child ~~is~~ in attendance at said high school. The relator demurred to certain portions of said answer and the demurrer was sustained. Proofs were heard upon the other issues, and the mandamus was awarded as prayed, ~~[illegible]~~

said child; that said child is a graduate of the eighth grade in said district (eighty miles per engine) at this high school [illegible] feet, [illegible] semi-annually in advance, and does not exceed the per capita cost of maintaining said high school; that there are ample funds in the hands of the treasurer of District No. eighty nine, and sufficient funds in his hands on July 1, 1914 to pay such tuition, including the amount, [illegible] thereto said District No. eighty nine levied a tax of five hundred dollars for the general expenses of said district for the current year, and that after paying said expenses there will remain a sum in the hands of the treasurer; that though often requested the directors of District No. eighty-nine refused to grant the transfer of said child, refused to approve the selection of said high school, and refused to pay the tuition charged relator for the attendance of said child at said high school and [illegible] any objections to the selection and without designating any other high school, [illegible] some of the facts alleged, and stating that some they had contracted to pay during the said school year, and that on July 29, 1914, they levied a tax of five hundred dollars for school purposes for the ensuing year, and that they appropriated said five hundred dollars for certain specified purposes, namely, for salary of teachers four hundred dollars, for fuel fifty dollars, for painting school house [illegible] for incidental expenses ten dollars, and that said child is in attendance at said high school. The relator demurred to certain portions of said answer and the demurrer was sustained, [illegible] were heard on the other issues, and the mandamus was issued [illegible]

No reason was given in the answer nor appeared in evidence why the directors should not approve the selection of the high school, nor did the answer deny those parts of the petition which showed that it was reasonable that said high school should be approved. The order directing the school officers to approve the selection of said high school was therefore proper.

The statute in question says that the tuition of such pupils shall be paid by the district in which they reside "from any funds not otherwise appropriated." We are of opinion that it was not intended by these words to confer upon the directors of a school district the same power which the legislature and cities have to appropriate specific funds for certain purposes, but that the reference is to the provision of the general school law which authorizes such directors to levy a tax annually of not exceeding a certain per cent for educational and a certain per cent for building purposes. Therefore respondents in our judgment were not authorized to defeat the right of the relator to have the tuition of his son at said high school paid out of the funds of the district by dividing up the amount levied for educational purposes, so as to appropriate to other purposes all the sum levied for educational purposes. Moreover, the school directors could not know in advance what the salaries of the teachers would be for the ensuing year. The proof was that the tuition charged by said high school of forty dollars per year did not exceed the per capita cost of maintaining said high school The proof indicated that payment in advance was required by said high school, and that at the time of the hearing of this case said child was in said high school by sufferance and liable to be expelled at any

We think that [illegible] concerned in evidence why the directors should not approve the abolition of the high school, nor did the answer any those parts of the petition which showed that it was reasonable that said high school should be [illegible] level. The order directing the [illegible] of said high school [illegible].

The statute in question says that the tuition of such pupils shall be paid by the district in which they reside "from any funds not otherwise appropriated." We are of opinion that it was not intended by [illegible] upon the directors of a school district the same power which the legislature and cities have to appropriate specific funds for certain purposes, but that the reference is to the provision of the general school law which authorizes such directors to levy a tax annually of not exceeding a certain per cent for educational and a certain per cent for building purposes. Therefore reasonights in our judgment were not authorized to defeat the right of the relator to have the tuition of his son at said high school paid out of the funds of the district by dividing up the maximum levied for educational purposes, so as to make appropriate to other purposes all the sum levied for educational purposes. Moreover, the school directors could not know in advance that the salaries of the teachers would be for the ensuing year. The [illegible] was that the tuition charged by said high school of forty dollars per year did not exceed the per capita cost of maintaining said high school. The court instructed that payment in advance was required by said high school, but that at the time of the bearing of this case the high school was in said high school by sufferance and liable to be sent home at any

time for non payment of said tuition. The judgment only required payment for the current year. An act filed in the office of the secretary of state on July 8, 1915, neither signed nor vetoed by the governor, repeals said act of 1913, and substitutes provisions somewhat different therefor, but that act does not affect the judgment of the court below in this case.

We find no error in the judgment and it is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

6175

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

200 I.A. 258

BE IT REMEMBERED, that afterwards, to-wit: on APR 14 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

100 Q. 351

Gen. No. 6175.

Joseph W.Maple, Admr., etc., Appellee, -vs- Stephen G.Lawhun, Appellant.	Appeal from Peoria.

DIBELL, P.J.

[~~This~~ proceeding, by citation under section ~~eighty-one~~ 81 of the administration act, ~~begun~~ by Joseph W.Maple, as administrator of the estate of Margaret M.Hennerly, deceased, against Stephen G. Lawhun, ~~resulted in an~~ rendered an order against respondent in the ~~probate court of Peoria County, and~~ on an appeal to the circuit court and a trial there de novo, ~~in another order made against him, whereby respondent was required~~ adjudging the respondent to turn over to the administrator a certain fund of $4000, derived from the sale of certain ~~papers~~ securities, ~~herein called the Denhart securities,~~ with certain interest charges thereon, and a certain note, executed by David Slaman, for $[illegible],095, and a mortgage securing the same, and certain interest charges in connection therewith.] ~~The amount of these several sums charged respondent for interest need not be more stated, as no question is raised but that the provisions of the order as to interest are correct if the order is correct as to the $4000 fund, and as to the Slaman note. This is an appeal by respondent from that order.~~ The [illegible] mortgage were by agreement placed in the hands of a third party to await the final result of this suit, and thus the amount

~~9. The appeal bond is sufficient.~~

Wenelin Hemmerly and his wife, Margaret, owned a business building on Adams street in the city of Peoria, and lived in the upper story thereof, and owned other property. He died on March 1, 1912, aged seventy-nine years, and she died on June 30, 1915, aged about seventy-seven years. ~~Whether the title to the real and personal property was in him or in her is immaterial as it is conceded that~~ Before his death he had vested the title to all his property in his wife so that she became the owner thereof. They lived in the second story of said Adams street property for some twenty-five years. Their heirs at law were four married daughters and the children of two other daughters then deceased. ~~Appellant is~~ Respondent the husband of one of said living daughters, and at the times herein question he lived with his family at 611 Frye Avenue. Mrs. Hemmerly owned a lot next to ~~appellants~~ respondents known as 609 Frye Avenue. The Hemmerlys decided to cease living over the store, and a dwelling house was built for them at 609 Frye Avenue. The construction thereof was begun in July, and finished in October, 1909, and the Hemmerlys occupied it. As the Hemmerlys became old and feeble, their unmarried daughter, Martha, who then made her home with her parents, ~~and is now Mrs. F. H. Eichenor~~, collected the rents under a power of attorney. Under the persuasion of [illegible] that power of attorney was revoked and from that time on ~~appellant~~ respondent collected the rents and attended to all the business affairs of Mr. and Mrs. Hemmerly. His contention concerning the $4000 ~~is~~ was that it was proposed for a long time, culminating perhaps in the spring of 1908, that he should build a house [illegible]

this vacant lot, similar to his own house, and should pay for it, and that when they died he should have the house and lot. He claims that from July to October, 1905, he did build the house at a cost of $4000, and paid for it himself, and that afterwards and after the store property had been sold, he asked Mrs. Hemmerly to pay back to him what he had expended for the house, and that she authorized him to take $4000 of her Denhart securities in payment for the cost of the house, and that he did so possess himself of said securities, and afterwards realized the cash upon them, and that he thus became the lawful owner of said $4000 in satisfaction of a like sum which he had paid for her. After the Hemmerlys had moved to Frye Avenue, ~~appellant~~ respondent negotiated for them, in part through an agent, a sale of the Adams street property for $25000 to David Slaman. The sale was consummated on October 30, 1911. The consideration was paid as follows: The purchaser assumed a $3500 mortgage upon said premises; he turned over to the Hemmerlys mortgage securities to the principal sum of $14,000, which he had obtained from the Denhart bank at Washington, Illinois; he gave a note to Mrs. Hemmerly for $6,395, and secured the same by a second mortgage on the premises; and he transferred to them three certificates of deposit issued by the Commercial German National Bank of Peoria, aggregating $332. These sums amount to $24,227. The balance appears to have been paid by some accrued interest on the Denhart securities, less accrued interest owing on the $3,500 mortgage assumed, and perhaps some commissions paid some one for conducting the sale, and possibly some cash. A tin box was obtained and these securities were placed therein, and Mrs. Hemmerly delivered the box to respondent to be placed in the

safety vault of the Merchants National Bank for safe keeping for her. She had a key to said box. He placed the box in the vault of the bank. There was no proof that she ever afterwards had access to that box. She was not with him when he placed it there. He had no information that she ever went to that box after he placed it in the bank. The trial in the probate court was some eighteen months before the trial in the circuit court, and during all that time he must have known it was important for him to ascertain if any officer or employee of the bank had ever seen Mrs.Hemmerly go to that box. He produced no proof on that subject. She gave the key to him at his request whenever there was any business of hers to be transacted in connection with the contents of the box, such as collecting interest on the securities. Appellant claims that near the end of her life, Mrs. Hemmerly brought him the Slaman note for $6.595, and the mortgage, and gave them to him as compensation for all he had ever done for her and that he thereby became the lawful owner of said note and mortgage. He had previously testified in a way that implied that all the securities for which the Adams street property was sold were placed in the tin box and taken by him to the bank and deposited in its safety vault, and that he did not remember taking anything out for her except interest coupons. Being confronted with the inquiry where she got the $6,595 Slaman note and mortgage to give to him, his only explanation was that probably she did not put those securities in the tin box. It further appeared that [illegible] had never [illegible] any [illegible] services, nor had he intended to do so, nor had they ever before offered to pay him anything. He did not show services of any such value. He testified he had had frequent settlements with Mrs.Hemmerly before that time,at which times she would naturally have paid him if she had owed him for services. In the latter part of her life and when she was ill, her daughters, other than Mrs.Lawhun, came to their mother and tried to

ascertain what had become of the proceeds of the sale of the Adams street property, but ~~appellant~~ respondent had acquired such an influence over her that she resented their inquiries, and some estrangement resulted. After her death the administrator opened the box and found that about $11,000 of the proceeds of the sale of the Adams street property had disappeared, and as Lawhun was the only one who had had access to the box or had transacted her business, the administrator filed this petition against Lawhun in order to ascertain where that part of the estate had gone to.

~~Appellant~~ Respondent argued that the possession of personal property ~~is~~ was proof of title, and that as he had possession of this $4000 fund and of this Slaman note and mortgage before Mrs. Hemmerly died, his title thereto ~~is~~ was thereby established, and that the case so made has not been overcome. ~~He states the general rule~~ correctly, but in our opinion that is not the law where the respondent was the confidential agent of the owner of the property, with lawful access thereto and abundant opportunity to transfer it to his own possession without the knowledge of the owner, but that in such case the agent who turns up with the property in his possession after the death of the owner through whom he had confidential access to the property, with the ability to get it secretly into his own possession, is required to assume the burden of establishing that he came by such property in good faith. Adams v Adams, 81 Ill. App. 637, and 181 Ill. 210. The fiduciary relation existing between appellant and Mr. and Mrs. Hemmerly, and between appellant and Mrs. Hemmerly after her husband died, is abundantly shown in this evidence, as well as his access at will to these securities; and his supposed possession does not, in our opinion, establish a title in him thereto.

~~Appellant~~ had for many years worked for an electric light company at Peoria at $70 per month, or $840 per year. He had a family to support. He received some rentals from certain real estate in Peoria, but he owed large sums secured thereon and had interest charges to pay, as well as repairs, insurance and taxes. By a will of his mother, which had never been admitted to probate, he claimed to own a farm in Kentucky, which he had not seen for twenty-five years, but from which he received $100 rent per year. By the same will he claimed to have received five shares of stock in a certain loan association in Indianapolis and that he realized something therefrom. At first he testified that he had received some $2000 therefrom over twenty years before. Afterwards his memory failed, and he was unable to testify anything about how much he had received therefrom. He claimed that by an arrangement with his employer he only worked about five hours per day and was allowed to take electrical jobs for himself on the outside, and that he did so and had done hundreds of such jobs, and thought he might have made $1000 per year thereby. When pressed to name those hundreds of jobs he was able to name but a very few of them, and he had no books of account by which he could show any of them. The superintendent of his employer testified that ~~appellant's~~ respondent's hours of labor at the plant were from seven a.m. to five thirty p.m. except two-thirds of Saturday afternoon, and that he knew of no arrangement by which ~~appellant~~ respondent was permitted to take outside work on his own account. ~~Appellant~~ respondent named the foreman with whom he had this arrangement, and the superintendent testified that that foreman had not worked for that company for fourteen years. ~~It is evident that appellant did not acquire~~

~~from these sources $4000 with which to build said house.~~ He had a brother, Samuel M. Lawhun, whom he had not seen for some twenty-five years. He testified that this brother came to his home on a visit in March, 1908, and stayed a week; that he told his brother that the Hammerlys had proposed that he build a house for them on their adjacent lot as good as his house, and they would give him the house and lot at their death; that the house would cost $4000, and he needed money with which to build it; that on March 10, 1908, during said visit, his brother took from his pocket $3800 in bills of the denomination of five, ten and twenty dollars, and loaned it to him, and that he gave his brother a promissory note therefor, payable in five years with interest at five per cent per annum, payable annually. He did not deposit said money in any bank, although he was accustomed to carry a deposit in a bank. He testified that he had in his cellar a sheet iron receptacle for the safekeeping of money and papers, fastened with a padlock, and that he placed said $3800 in that receptacle. The contract for the house was not made till one year and three months thereafter, and he was paying interest on various debts, yet he kept this money in the [illegible] any investment all that time. He testified that he built that house mostly with this money, though he drew some small checks therefor on a small checking account which he kept in a bank, and that said small checking account only contained about $200 at a time; and that he paid $4000 for the house. S. M. Lawhun testified that he left his Kentucky home when he was less than ten years old and had ever since shifted for himself; that he had been in every city in the United States; that he became a photographer; that he would go to a town and establish a gallery and run it two or three months or two or three years and sell out

then go to another town and start another; that in that business he sometimes made $100 per day, sometimes $100 per week, sometimes $100 per month and sometimes he worked for his food. He testified that he had a trunk in which was a private receptacle for papers and money; that in April, 1908, he came to Peoria to visit his brother Stephen, whom he had not seen since early boyhood, and brought in said trunk about $4800 in currency; that though he had with him a wife and child and stayed a week he left this trunk in the baggage room of the passenger station at Peoria; that when he found his brother needed money with which to build this house, he went to the baggage room, opened the trunk, took out $3800 carried it to the house, loaned it to his brother, and took his brother's note for five years without security therefor. No witness but ~~appellant~~ respondent and his brother testified ~~that~~ to ever seeing this money. ~~Appellant~~ Respondent testified that he sent his brother once $190 or one year's interest, and another time $380 or two years' interest, and once he paid himsome interest when his brother paid him a subsequent visit at Peoria, and that this was all the interest he paid, and that he did not remit this $190 and $380 by check or draft or express, but that in each case he did up a package containing the amount named in five, ten and twenty dollar bills and sent them to his brother by registered letter, and received in each case a registry receipt which showed the amount of the remittance, though the officer who issued the receipt did not see the money. He was unable to produce any such receipts, and he did not call any one connected with the Post Office to show that any such registered mail was ever sent. S. M. Lawhun testified that $380 was once sent to him by mail by ~~appellant~~ respondent as interest, but that he never had to sign any receipt when he received it, and that the rest of the interest was remitted in sums of five, ten and twenty dollars at a time by mail, and that he had received

over fifty witnesses of interest to said respondent. The sum in respondent's iron box grew the longer he was questioned about it. At first he stated that there was some other money in the iron box, and that when this $3800 was put in that made about $4500 in the iron box. Before he was through testifying he had stated that when the $3800 was placed in the box it made the total therein about $7800. He did not explain the change in his testimony from $3800 to $4500, nor from $4500 to $7800, nor did he show any source from which he could have obtained this extra $4000. None of this money in the box was ever reported to the assessor. ~~It is possible that this evidence is true. Men have hidden large sums of money and have the hoarded money very carelessly. Obviously The narrative, however, is exceedingly improbable. Obviously it~~ was not believed by the probate judge nor by the circuit judge. They saw these witnesses and observed their demeanor on the witness stand. We have not equal opportunity with them to judge of its truth, and we do not feel called upon to credit what they disbelieved.

~~But this is not all~~ the evidence bearing on that subject. On August 10, 1909, shortly after the erection of the house was begun, respondent procured for Mr. and Mrs. Hemerly a loan of $1000 at a bank in Peoria, and received a check for $987.17, the discount value of said note; and they turned that check over to respondent, and he deposited it in his own account in the Merchants National Bank. Four days later, on August 14, he paid Duff & Brown, the contractors who built said house, a check on said account for $200 and on September 3rd another check for $200, and on September 21 another check for $200, making $600 that were clearly

paid out of money the Hemmerlys borrowed just after the house was begun. ~~Appellant~~ Respondent could not find his other checks on said account nor the stubs from which they were drawn, ~~but it is fair to assume that that loan for $1000 obtained by the Hemmerlys and deposited in appellant's bank account was used as part payment on this house. We have already mentioned that when the Adams street property was sold there was a mortgage on it for $2500. That loan was obtained by the Hemmerlys on October 26, 1909, at about the time of the completion of the house.~~ The man from whom they got it understood it was to be used to pay for this house, though he did not pay special attention to that as his security was on other real estate. For that loan Hemmerly received a check to his order for $3,496.50. He endorsed it in blank and delivered it to ~~appellant~~ respondent. On the next day ~~appellant~~ respondent deposited that check in his own account in the Merchants National Bank, and on the same day drew a check on that account for $1,003 to pay the loan of $1000 the Hemmerlys had made in August, and also drew a check to Duff & Brown for $1000. ~~Appellant~~ Respondent testified that Duff & Brown had done nothing for which ~~appellant~~ respondent should pay them except to build this house. ~~Therefore, this $1000 was paid by appellant out of the funds belonging to the Hemmerlys. Therefore, at least $1,400 of the cost of the house was paid by appellant out of the funds of the Hemmerlys.~~ ~~Appellant~~ Respondent did not produce checks to show what he did with the rest of their moneys, deposited in his account, ~~and it is a reasonable conclusion that they borrowed that $3500 to pay for building this house, and [illegible] applied by appellant.~~ I~~[illegible]~~ ~~[illegible]~~ ~~appellant~~ respondent testified that he deposited the $3,49[illegible].50 in his own account in the bank

because Mrs.Hemmerly was averse to having a check, and that he paid ~~her~~ her that sum in cash out of the money in his iron box in his cellar, and he left the impression that he paid her that sum in money at once. Afterwards he stated that he did not pay it at once nor in large sums, but that whenever she wanted to pay a bill or wanted a little money for her own use he paid her in small sums from time to time, and had frequent settlements with her, and in this way gradually paid her the $3,495.50. ~~In this state~~ of the proof we are satisfied that the Hemmerlys borrowed the $3500 and placed it in the hands of appellant to pay for the building of the house, and that appellant expended that money for that purpose.

~~It is worthy~~ of note that in scarcely ~~any matter vital to this case is appellant corroborated by any oral testimony except that of his brother, and that~~ most of the checks and stubs of checks and receipts which might throw light upon this case he were not produced. ~~He has~~ Respondent and definitely ~~told the court~~ accustomed to keep such papers. He had not shown that he made thorough search in all places where such papers might be. In his earlier examination he indicated that he might find them by further search. His last explanation was that his wife told him that at a certain house cleaning event she destroyed some of his checks and papers. ~~Although his transactions with the Hemmerlys amounted to many thousands of dollars~~ He kept, or at least produced no book account of his transactions with the Hemmerlys ~~thereof~~. His claim that Mrs. Hemmerly gave him $4000 of Denhart securities to repay him that he had spent of his own funds in building the house rests solely on his own testimony. He ~~must have known~~ that it would be valuable to him to have some disinterested witness to the trans-

action. He did not have any such witness, and these securities were in a box to which he alone had actual access. That he knew the value of evidence is shown by the fact that on July 12,1912, he induced Mrs.Hommerly to go with his wife to a lawyer and there have a paper drawn in English, a language which [illegible] of the evidence shows she could not read, in which she certified to her confidence in appellant's honesty,and that he had transacted the business of her husband and of herself fairly and had no money or papers in his hands belonging to her! There is nothing except appellant's testimony, to show that she knew then or at any time during her life, that he had taken $4000 worth of the Denhart securities, or that he then had the Slaman note. We approve the decision of the court below as to the $4000.

That the Sloman note for $6,395, kept in said tin box in the bank, was given to him by Mrs.Hommerly to pay him for his services rests upon appellant's unsupported testimony, and under all the circumstances his claim ought not to stand in view of the fiduciary relation in which he stood to her and the fact of his access to the tin box in the bank, and of his evidence that the proceeds of the sale of the Adams street property were placed in that box, and of the fact that apparently no one but himself could have taken it out of that box.

There are numerous other matters in evidence which tend to create doubt of the validity of appellant's claims, but it would unduly extend this opinion to discuss the evidence further. There are many notes, checks and other documents in this record. Our rule 16 (137 Ill.App. 625) requires that the abstract shall have an index which shall give the page where each paper material will be found! Each party filed an abstract. Neither of them

indexed the exhibits. We have been put to much unnecessary labor by this omission to observe the rule.

No question has been raised here as to the authority of the probate court to take this action under section 81 of the Administration Act, and we therefore do not discuss that subject.

The order is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

61-0

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

200 I.A. 2-3

BE IT REMEMBERED, that afterwards, to-wit: on APR 14 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6180.

Mary Virginia Marcy, Excrx. &c

appellant.

vs Appeal from Peoria.

Milton S. Marcy, appellee.

Dibell, P. J.

R. Sumner Marcy died in New Jersey on March 5, 1894, owning real and personal estate in New Jersey and leaving a last will which was duly admitted to probate. By his will he gave his widow. Mary S. Marcy, his personal property and the use of his real estate so long as she remained his widow, but authorized his executors in their discretion to sell his real estate during her lifetime and invest the proceeds and pay the income therefrom to his widow, and directed that at her remarriage or death the executors should sell said real estate. The will gave legacoes of $100 each to his son, Milton S. Marcy, to his daughter, Hetty O.Miller, and to his grandson Sumner M. Miller and his grand daughter Anna Miller, said legacies to the grandchildren to be paid to them at the age of eighteen years, which they have long since reached. The residue of his estate was given to his son, Walter E. Marcy, and his daughter Lucy E. Marcy, both of whom were blind from birth; and said residuary clause contained certain provisions if either or both of them should die without lawful issue. The will nominated Mary S. Marcy and Milton S. Marcy as executors, but they declined to qualify and an administrator with the will annexed administered the estate. The widow never re-married and she died on January 27, 1907. During her lifetime the administrator and each of the beneficiaries joined in a deed, conveying certain real estate left by the deceased for $3,659.47. By consent of all the beneficiaries

Gen. No. 8180.

Mary Virginia Merry, Exxor., &c

Appeals 4.

vs Appeal from Peoria.

Milton S. Merry, appellee.

Mr. J. J.

R. Sumner Merry died in New Jersey on March 5, 1884, owning real and personal estate in New Jersey and leaving a last will which was duly admitted to probate. By his will he gave his widow, Mary S. Merry, his personal property and the use of his real estate so long as she remained his widow, but authorized his executors in their discretion to sell his real estate during her lifetime and invest the proceeds and pay the income therefrom to his widow, and directed that at her remarriage or death the executors should sell said real estate. The will gave legacies of $100 each to his son, Milton S. Merry, to his daughter, Hetty O. Miller, and to his grandson Sumner M. Miller and his grand daughter Anne Miller, said legacies to the grandchildren to be paid to them at the age of eighteen years, which they have long since reached. The residue of his estate was given to his son, Walter C. Merry, and his daughter Lucy T. Merry, both of whom were blind from birth; and said residuary clause contained certain provisions if either or both of them should die without lawful issue. The will nominated Mary S. Merry and Milton S. Merry as executors, but they declined to qualify and an administrator with the will annexed administered the estate. The widow never re-married and she died on January 27, 1907. During her lifetime the administrator had sold at his discretion, paid in a lump, conveying certain real estate left by the

under the will, $639.47 of the consideration for which said real estate was sold was paid to the widow to be used by her as she saw fit, and the remaining $3000.60 was placed in the hands of Milton S. Marcy for investment, and he was to pay over the income and ~~distributing the~~ distribute the principal in accordance with the will of the testator. Under this arrangement the four legacies of $100 each were not paid, and the interest on said $3000.00 was divided equally from time to time between Walter and Lucy. Afterwards Walter conveyed to Lucy whatever interest he had in another piece of real estate left by the testator, and in payment therefor Lucy directed Milton to transfer $800 of her share of said fund to Walter's part of said fund, and thereafter Milton paid the interest on $2300 to Walter and on $700 to Lucy. On February 15, 1912 Walter died without issue and left a will which was duly probated, whereby he gave all his property to his widow, Mary Virginia Marcy, and made her executrix of his will. She claimed that at his death Walter owned $2300 of said fund in the hands of Milton, and demanded it of Milton, and Milton refused to pay it. Thereupon as executrix and in her own right she filed a bill in equity against Milton S? Marcy in the circuit court of Peoria County, where Milton resided, for an accounting of the investment of said $2300 and for the payment to her of the principal thereof and interest thereon since the death of Walter. In said bill, she claimed that the expression "die without lawful issue" in the residuary clause of the will of R. Sumner Marcy meant die without issue before the expiration of the life estate granted to the widow, and that when Marcy S. Marcy died while Walter was still living, he then became the absolute owner of said $1500 and of said $800 and she therefore was entitled to the same under the will of

under the will, $[illegible].17 of the consideration for which such real estate was sold was paid to the widow to be used by her as she saw fit, and the remaining $3000.00 was placed in the hands of Milton S. Murray for investment, and he was to pay over the income and ~~[illegible]~~ distribute the principal in accordance with the will of the testator. Under this arrangement the four legacies of $100 each were not paid, and the interest on said $3000.00 was divided equally from time to time between Walter and Lucy. Afterwards Walter conveyed to Lucy whatever interest he had in another piece of real estate left by the testator, and in payment therefor Lucy directed Milton to transfer $800 of her share of said fund to Walter's part of said fund, and thereafter Milton paid the interest on $3800 to Walter and $700 to Lucy. On February 16, 1894 Walter died without issue and left a will which was duly probated, whereby he gave all his property to his widow, Mary Virginia Murray, and made her executrix of his will. She claimed that at his death Walter owned $3800 of said fund in the hands of Milton, and demanded it of Milton, and Milton refused to pay it. Thereupon as executrix and in her own right she filed a bill in equity against Milton and Mary in the circuit court of Fairfax County, where Milton resided, for an accounting of the investment of said $3800 and for the payment to her of the principal thereof and interest thereon since the death of Walter. In said bill, she claimed that the expression "die without lawful issue" in the residuary clause of the will of R. Sumner Murray meant die without issue before the exploitation of the life estate granted to the widow, and that when Lucy S. Murray died while Walter was still living, he then became the absolute owner of said $1800 and of said $700 and he therefore was entitled to the same under the will of

Walter. Milton answered, claiming that under a true construction of said residuary clause, it meant "die at any time without lawful issue;" that when Walter died without issue, the whole income passed to Lucy during her lifetime; and that when she should die, if without issue, then by virtue of certain other language in said residuary clause, making provision for the death of both Walter and Lucy without lawful issue, the fund would first go to pay said four legacies of $100 each and the rest to Milton S. Marcy and Hetty O. Miller, or to the survivor of them if only one was then living. Under an order of reference the master took the proofs and reported that Milton should pay from said fund the costs and the four legacies of $100 each, and should divide the residue into two equal parts, and should pay complainant one-half thereof and $800 from the other half, and should pay the balance to Lucy. The court sustained some and overruled other exceptions to said report, and held that all the funds vested in Lucy upon the death of Walter as well as the income accruing after the death of Walter and dismissed the bill for want of equity. Complainant below appeals.

Complainant claims that she is entitled to the entire $2300 to the exclusion of the four legacies of $100 each. Defendant claims that she is entitled to hold the entire fund till the death of Lucy and pay her the income and if she dies without lawful issue the fund belongs to himself and his sister, Mrs. Miller, if they both survive Lucy, and the court decreed that the entire fund belonged to Lucy. The only persons parties to this litigation are the complainant and Milton S. Marcy. On this appeal the court is asked to determine that Lucy has no interest in the $2300 and that the four legacies of $100 each were abandoned by the legatees

Walter. Milton answered, claiming that under a true construction of said residuary clause, it meant "die at any time without lawful issue;" that when Walter died without issue, the whole income passed to Lucy during her lifetime; and that when she should die, if without issue, then by virtue of certain other language in said residuary clause, making provision for the death of both Walter and Lucy without lawful issue, the fund would first go to pay said four legacies of $100 each and the rest to Milton E. Verdy and Betty O. Miller, or to the survivor of them if only one was then living. Under an order of reference the master took the proofs and reported that Milton should pay from said funds the costs and the four legacies of $100 each, and should divide the residue into two equal parts, and should pay complainant one-half thereof and $800 from the other half, and should pay the balance to Lucy. The court sustained some and overruled other exceptions to said report, and held that all the funds vested in Lucy upon the death of Walter as well as the income accruing after the death of Walter and dismissed the bill for want of equity. ~~Complainant below appeals.~~

Complainant claims that she is entitled to the entire $8000 to the exclusion of the four legacies of $100 each. Defendant claims that she is entitled to hold the entire fund till the death of Lucy and pay over the income and if she dies without lawful issue the fund belongs to Marcell and his sister, Mrs. Miller, if they both survive Lucy, and the court decreed that the entire fund belonged to Lucy. The only persons parties to this litigation are the complainant and Milton E. Verdy. On this appeal the court is asked to determine that Lucy has no interest in the $8000 and that the four legacies of $100 each were abandoned by the legatees

when they consented to deliver $639.47 of the proceeds of the real estate to the widow of R. Sumner Marcy. These legatees and Lucy were not parties to this suit. In equity every person having equitable or legal rights in the subject matter of the suit should be made a party. It is not necessary that the lack of proper parties should be set up by either side, for whenever the court finds a lack of proper parties, it "will, ex officio, take notice of such omission," and will refuse to proceed in the suit till the pleadings have been amended and the omitted parties brought into court. Prentice v Kimball, 19 Ill. 319; Granquist v Western Tube Co. 240 Ill. 132; Conway v Sexton, 243 Ill. 59; Nolan v Barnes, 262 Ill. 515; and authorities there cited, to which might be added many other cases, and 30 CYC 141. We are of opinion that Lucy E. Marcy, Hetty O. Miller, Sumner M. Miller and Anna Miller, if they are still living, and the persons who legally represent the interests of any of them who may be deceased, must be made parties to this litigation before the court has lawful power to decide the questions raised by the pleadings and evidence and arguments here presented.

The decree is therefore reversed and the cause is remanded to the circuit court of Peoria County, with leave to appellant to make parties to the suit the persons ~~xxxxxxxxxxx~~ herein above indicated, and to make such amendments to the pleadings as may be proper. If appellant should elect not to take such course within a reasonable time, then the court is directed to dismiss the bill. Appellant and appellee will each pay one-half of the costs of this court.

Reversed and remanded with directions.

Niehaus, J. took no part.

when they consented to deliver $658.47 of the proceeds of the real estate to the widow of R. Sumner Marcy. These legatees and Lucy were not parties to this suit. In equity every person having equitable or legal rights in the subject matter of the suit should be made a party. It is not necessary that the lack of proper parties should be set up by either side, for whenever the court finds a lack of proper parties, it "will, ex officio, take notice of such omission," and will require [illegible] bill [illegible] pleadings [illegible] amended and the omitted parties brought into court. Prentice v Campbell, 19 Ill. 519; Grandquist v Western Tube Co. 240 Ill. 135; Conway v Sexton, 243 Ill. 53; Nolan v Barnes, 2[illegible] Ill. 515; and authorities there cited, to which might be added many other cases, and 30 CYC 141. We are of opinion that Lucy E. Marcy, Hetty O. Miller, Sumner M. Miller and Anna Miller, [illegible] court was [illegible] to [illegible] the questions raised by the pleadings and [illegible] were presented.

The decree is therefore reversed and the cause is remanded to the circuit court of [illegible] County, with leave to appellant to make parties to the suit the persons [illegible] were indicated, and [illegible] such amendments to the pleadings as may be proper. If appellant does not [illegible] this suit within a reasonable time, then the court is directed to dismiss the bill. Appellant and appellee will each pay one-half of the costs of this court.

Reversed and remanded with directions.

[illegible], J. took no part.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6184

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

200 1.277

BE IT REMEMBERED, that afterwards, to-wit: on APR 14 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6184.

James T. Burns, Admr. etc.

appellee.

vs Appeal from Kankakee.

Nellie Clark, appellant.

Dibell, P. J.

On September 7, 1915, James T. Burns, Administrator of the estate of Carrie Langdon, deceased, brought an action of assumpsit against Nellie Clark in the Kankakee Circuit Court and filed a declaration consisting of the common counts, with an affidavit attached thereto that defendant was indebted to plaintiff in the sum of $3,779.90. Defendant filed a plea of non-assumpsit, accompanied by an affidavit that she had duly stated the case to her attorney and was advised by him that she had a good defense on the merits to the whole of the plaintiff's demands, and that she believed that to be true. There was a jury trial and a verdict for plaintiff for $3179.90, and judgment for plaintiff therefor and defendant appeals.

Mrs. Nellie Clark, Mrs. Carrie Langdon and Levi Benjamin were sisters and brother. Dr. F. R. Langdon, husband of Carrie Langdon, died at Louisville, Kentucky, early in February 1913. Benjamin and Mrs. Clark went there to the funeral. Mrs. Langdon was suffering from an incurable disease and after the funeral her brother and sister brought her to the home of Mrs. Clark in Kankakee, Illinois. Mrs. Langdon had money in a bank in Louisville, and before they left there Mrs. Clark was in possession of the amount Mrs. Langdon had in the bank in the shape of a draft or check which she brought with them to Kankakee. Shortly after they reached Kankakee, probably the next day, and on February 13, 1913, Mrs. Clark opened a checking account in a bank in Kankakee in the name of "Mrs.

[illegible]

James T. Burns, Adm., etc.

-vs-

[illegible]

vs. Appeal from Kankakee.

[illegible]

Dibell, P. J.

On September 7, 1915, James T. Burns, administrator of the estate of Carrie Langdon, deceased, brought an action of assumpsit against Nellie Clark in the Kankakee Circuit Court and filed a declaration consisting of the common counts, with an affidavit attached thereto that defendant was indebted to plaintiff in the sum of $3,272.60. Defendant filed a plea of non-assumpsit, coupled with an affidavit that she had duly stated the case to her attorney and was advised by him that she had a good defense on the merits to the whole of the plaintiff's demand, and that she believed that to be true. There was a jury trial and a verdict for plaintiff for $3172.50, and judgment for plaintiff therefor and defendant appeals.

Mrs. Nellie Clark, Mrs. Carrie Langdon and Dr. Benjamin were sisters and brother. Dr. F. R. Langdon, husband of Carrie Langdon, died at Louisville, Kentucky, early in February 1913. Benjamin and Mrs. Clark went there to his funeral. Mrs. Langdon was suffering from an incurable disease and after the funeral her brother and sister brought her to the home of Mrs. Clark in Kankakee, Illinois. Mrs. Langdon had money in a bank in Louisville, and before they left there Mrs. Clark was in possession of the amount Mrs. Langdon had in the bank in the shape of a draft or check which she brought with them to Kankakee. Shortly after they reached Kankakee, probably the next day, and on February 15, 1913, Mrs. Clark opened a checking account in a bank in Kankakee in the name of "Mrs.

P. R. Langdon or Nellie Clark" and deposited on that day to said account said draft or check in the sum of $3,179.90 and received a deposit book in the same name. On June 5, 1913 Mrs. Clark drew out that sum of money and closed the account. On June 8, 1913, Mrs. Langdon died. Thereafter appellee became Administrator of Mrs. Langdon's estate and brought this suit to recover the amount of said deposit. Mrs. Clark, in defense proved by various witnesses declarations by Mrs. Langdon; some to the effect thatshe had given this draft or this money or all her money to Mrs. Clark; and others that she wanted or intended to give this money or her property to Mrs. Clark. Mrs. Clark had kept a house of ill fame and is the party named as appellant or plaintiff in error in People v Clark 187 Ill. App. 613, and 268 Ill. 156. Appellee in cross examination of appellants witnesses and otherwise proved that the place where Mrs. Clark kept Mrs. Langdon till her death was or had been a house of ill-fame, and compelled several of her witnesses to give testimony tending to show that they were or had been inmates of that house, and it is contended by appellant that it was error to permit this kind of cross examination to defame the witnesses and appellant, and that thereby the jury were greatly prejudiced against appellant, and that but for the great stress laid upon this subject by appellee's counsel the jury must have returned a verdict for appellant. The keeper of a house of ill fame is entitled to a fair trial in a suit involving property rights, and it has been a serious question with us whether the rights of appellant were not unduly prejudiced in the minds of the jury by the course prusued by appellee's counsel; and whether a new trial ought not to be awarded for that reason. There is however, a condition appearing near the close of the proofs which satisfies us that no other verdict could have been rendered.

F. R. Langdon or Nellie Clark" and "specifies on that day to said account said draft or check in the sum of $3,172.89 and received a deposit book in the same name. On June 5, 1913 Mrs. Clark drew out that sum of money and closed the account. On June 6, 1913, Mrs. Langdon died. Thereafter appellee became Administrator of Mrs. Langdon's estate and brought this suit to recover the amount of said deposit. Mrs. Clark, in defense proved by various witnesses declarations by Mrs. Langdon; done to the effect that she had given this draft or this money or all her money to Mrs. Clark; and others that she wanted or intended to give this money or her property to Mrs. Clark. Mrs. Clark had kept a house of ill fame and is the party mentioned as appellant in quarrels in Clark v. Clark 187 Ill. App. 615, and 268 Ill. 188. A perjury in open examination of appellant witnesses and otherwise proved that the place where Mrs. Clark kept Mrs. Langdon till her death was or had been a house of ill-fame, and compelled several of her witnesses to give testimony tending to show that they were or had been inmates of that house, and it is contended by appellant that it was error to permit this kind of court examination to defame the witnesses and appellant, and that thereby the jury were greatly prejudiced against appellant, and that but for the great stress laid upon this subject by appellee's counsel they jury must have returned a verdict for appellant. The keeper of a house of ill fame is entitled to a fair trial in a suit involving property rights, and it has been a serious question with us whether the rights of appellant were not unduly prejudiced in the minds of the jury by the course pursued by appellee's counsel; and whether a new trial ought not to be awarded for that reason. There is however, a condition appearing near the close of the proofs

A few days before Mrs. Langdon died Mrs. Latimer, a daughter of Mrs. Langdon by a former marriage, and her husband, came from their home in Springfield, Ohio, to Kankakee upon a telegram from Mrs. Clark and remained there till after the funeral of Mrs. Langdon. They had a conversation with Mrs. Clark after the funeral concerning this money deposited in the Kankakee Bank. They testified that Mrs. Clark at first denied that there was any money in the Kankakee Bank belonging to Mrs. Langdon, and that when Latimer told her that they had been to the bank and ascertained that Mrs. Langdon had money on deposit there, Mrs. Clark then admitted to them that their mother had about $3,200 on deposit in the bank. In rebuttal Mrs. Clark was called as a witness in her own behalf as to said conversation, and she placed the conversation at a different hour of the day from what the Latimers did, and gave a somewhat different version of it, but stated that she in that conversation said to them: ("She (meaning Mrs. Langdon) gave all the money she had to me to pay her bills." This was entirely in harmony with her opening the account in the bank in the name of Mrs. Langdon or herself placing Mrs. Langdon's name first. Mrs. Clark had a savings deposit in the same bank, and if she had possession of the draft or check from Mrs. Langdon as her own property by gift from her sister, she would naturally have deposited it in her own account. The form in which it was deposited was consistent with the idea that it was still Mrs. Langdon's money, but that Mrs. Clark could check it out in payment of Mrs. Langdon's bills. Under the state of facts disclosed by Mrs. Clark's evidence, if it was true, she could not be permitted to retain the entire deposit as her own, but she would have been at liberty to show by competent witnesses what bills Mrs. Langdon incurred during the four months

A few days before Mrs. Langdon died Mrs. Lattimer, a daughter of Mrs. Langdon by a former marriage, and her husband, came from their home in Springfield, Ohio, to Kankakee upon a telegram from Mrs. Clark and remained there till after the funeral of Mrs. Langdon. They had a conversation with Mrs. Clark after the funeral concerning this money deposited in the Kankakee Bank. They testified that Mrs. Clark at first denied that there was any money in the Kankakee Bank belonging to Mrs. Langdon, and that when Lattimer told her that they had been to the bank and ascertained that Mrs. Langdon had money on [illegible] Mrs. Clark [illegible] mother had about $3,000 on deposit in the bank. In rebuttal Mrs. Clark was called as a witness in her own behalf as to said conversation, and she placed the conversation at a different hour of the day from what the Lattimers did, and gave a somewhat different version of it, but stated that she in that conversation said to them: (~~xxxxx~~ "She (meaning Mrs. Langdon) gave all the money she had to me to pay her [illegible]." [illegible] placing Mrs. Langdon's name first. Mrs. Clark had a savings deposit in the same bank, and if she had possession of the draft or check from Mrs. Langdon as her own property by gift from her sister, she would naturally have deposited it in her own account. The form in which it was deposited was consistent with the idea that it was still Mrs. Langdon's money, but that Mrs. Clark could check it out in payment of Mrs. Langdon's bills. Under the state of facts disclosed by Mrs. Clark's evidence, if it was true, she could not permitted to retain the entire deposit as her own, but she would have been at liberty to show by competent witnesses that bills Mrs. Langdon incurred during the four months

she lived in Mrs. Clark's home, and the proper amount of such bills, and that she had paid them or become liable to pay them. Appellant contends that the court refused to permit such proof. This is a ~~xxxxx~~ misapprehension of the record. Her counsel did then ask her: "Did you pay all her bills?" and the court sustained an objection thereto. Under the statute Mrs. Clark was a competent witness as to the conversation with the Latimers after the death of Mrs. Langdon, but she was not competent to testify to what she did in the lifetime of her sister. If she had answered this question by "Yes" that would have been immaterial. Apparently the idea in the minds of counsel was that if she testified she had paid all of Mrs. Langdon's bills, that would entitle her to retain the entire fund. No effort was made by appellant to prove what bills were incurred nor what sums she paid upon any bills for Mrs. Langdon. Apparently she thought proper to rest her case solely upon the claim that the fund was an absolute gift to her. Dr. Brown, a witness for appellant attended Mrs. Langdon during the entire four months. He was not asked the amount of his proper charges for his services to her, nor whether he had been paid, nor by whom. As appellant conceded according to her own testimony, in her conversation with the Latimers, that this fund was placed in her hands to pay the bills of Mrs. Langdon, and as she did not chose to prove that she had paid any such bills nor how much she paid, the jury could not do otherwise than return a verdict for appellee for the full amount of the deposit.

The court gave an instruction for appellee that under the pleadings they had no right to deduct from the sum, if any due plaintiff any sum defendant may have earned by caring for Mrs. Langdon during her last illness or which she may have

she lived in Mrs. Clark's home, and the proper amount of such bills, and that she had paid them or became liable to pay them. Appellant contends that the court refused to permit such proof. This is a manifest misapprehension of the record. Her counsel did then ask her: "Did you pay all her bills?" and the court sustained an objection thereto. Under the statute Mrs. Clark was a competent witness as to the conversation with the Lattimers after the death of Mrs. Langdon, but she was not competent to testify to what she did in the lifetime of her mistress. If she had answered this question by "Yes" that would have been immaterial. Apparently the idea in the minds of counsel was that if she testified she had paid all of Mrs. Langdon's bills, that would entitle her to retain the entire fund. No effort was made by appellant to prove what bills were incurred nor what sums she paid upon any bills for Mrs. Langdon. Apparently she thought proper to rest her case solely upon the claim that the fund was an absolute gift to her. Dr. Brown, a witness for appellant attended Mrs. Langdon during the entire four months. He was not asked the amount of his proper charges for his services to her, nor whether he had been paid, nor by whom. Appellant conceded according to her own testimony, in her conversation with the Lattimers, that this fund was placed in her hands to pay the bills of Mrs. Langdon, and as she did not choose to prove that she had paid any such bills nor how much she paid, the jury could not in otherwise than return a verdict for appellee for the full amount of the deposit.

The court gave an instruction for appellee that under the pleadings they had no right to deduct from the sum, if any due plaintiff any sum defendant may have earned by nursing for Mrs. Langdon during her last illness or which she may have

expended for the benefit of Mrs. Langdon. We conclude that if Mrs. Clark received the fund for the purpose admitted by her and had made such expenditures, she was entitled to recoup the amount thereof. Recoupment is the act of abating a part of a claim on which one is sued, by means of a legal or equitable right resulting from a counter claim arising out of the same transaction. It rests on the principle that it is just and equitable to settle in one action all claims growing out of the same contradt or transaction. It is a reduction of the damages claimed by plaintiff by proof of circumstances connected with the transaction on which the plaintiff's claim is based which show that it would be contrary to good conscience to permit plaintiff to recover the full amount of his claim. 34 CYC 623, 624. This can be done under the general issue, which in this case was the plea of non assumpsit. Higgins v Lee, 16 Ill. 495; Babcock v Trice 18 Ill. 420; Turner v Retter, 58 Ill. 364; Murray v Carlin 67 Ill. 236; Cooke v Preble, 30 Ill. 381; 34 CYC 643. For statutory reasons this lack of necessity for a special plea seems not to apply to a suit on a note.Waterman v Clark, 78 Ill. 428. But as there was no evidence from which the jury could allow Mrs. Clark any sum for services or disbursements on account of Mrs. Langdon, the giving of the instruction in that form did not harm appellant. The instruction should have said that the jury could not do this under the evidence, instead of under the pleadings. In the view we take of the evidence of Mrs. Clark and her failure to ~~xxxxxxx~~ introduce any evidence showing what, of anything, she had expended for Mrs. Langdon, the other questions argued by appellant are immaterial and need not be discussed, further than to say that Latimer was a competent witness to what he and Mrs. Clark said in their conversation, and he did not relate what

expended for the benefit of Mrs. Langdon. We conclude that if Mrs. Clark received the fund for the purpose admitted by her and had made such expenditures, she was entitled to recoup the amount thereof. Recoupment is the act of abating a part of a claim on which one is sued, by means of a legal or equitable right resulting from a counter claim arising out of the same transaction. It rests on the principle that it is just and equitable to settle in one action all claims growing out of the same contract or transaction. It is a reduction of the damages claimed by plaintiff by proof of circumstances connected with the transaction on which the plaintiff's claim is based which show that it would be contrary to good conscience to permit plaintiff to recover the full amount of his claim. 3a CYC 889, 892. This can be done under the general issue, which in this case was the gist of non assumpsit. Higgins v Lee, 18 Ill. 495; Babcock v Trice 18 Ill. 420; Turner v Potter, 88 Ill. 264; Murray v Carlin 67 Ill. 238; Cooke v Preble, 80 Ill. 381; 34 CYC 646. For statutory reasons this lack of necessity for a special plea seems not to apply to a suit on a note.Waterman v Clark, 76 Ill. 428. But as there was no evidence from which the jury could allow Mrs. Clark any sum for services or disbursements on account of Mrs. Langdon, the giving of the instruction in that form did not harm appellant. The instruction should have said that the jury could not do this under the evidence, instead of under the pleadings. In the view we take of the evidence of Mrs. Clark and her failure to introduce any evidence showing what, of anything, she had expended for Mrs. Langdon, the other questions argued by appellant are immaterial and need not be discussed, further than to say that Lathrop was a competent witness, he was not a party

his wife said in that conversation. We find no reversible error in the record, and the judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present -- The Hon. JOHN M. NIEHAUS, Presiding Justice

Hon. DUANE J. CARNES, Justice

Hon. DORRANCE DIBELL, Justice

CHRISTOPHER C. DUFFY, Clerk

E, M. DAVIS, Sheriff

200 I.A. 301

BE IT REMEMBERED, that afterwards, to-wit: On April 14, A. D. 1916, the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

Gen. No. 6025. Ag. No. 1.

542

ELIZABETH POOLER, Appellant,	)	
-vs-	:	APPEAL FROM LA SALLE.
PLINY C. SOUTHWICK, Appellee.	)	

CARNES, J.

In June or July, 1904, the appellant, Elizabeth Pooler, was riding on a public highway with her niece in a horse drawn carriage. The horse became frightened by an approaching automobile driven by the appellee, Pliny C. Southwick, and appellant was thrown from the carriage and seriously injured. July 6, 1905, she began this action to recover for that injury and filed a declaration charging only common law negligence in carelessly and negligently running and operating the automobile upon a public highway. On February 27, 1907, she filed two additional counts to the declaration declaring upon the act of 1903 to Regulate Speed of Automobiles (Hurd's Rev.Stats. 1903, Chap. 121, Par. 269a) It was provided in that act in section one that an automobile should not be driven along any road or highway faster than fifteen miles per hour; in section two that when a horse driven upon the road became frightened by the approach of an automobile the driver should bring the machine to a full stop; and in section four that in an action for damages proof of the violation of either of

court and appellee answers that neither one of said additional counts has any place in the legal consideration of this case; that there is but one count of the declaration before us and that is the first, or original common law count, because he says the counts were filed more than two years and a half after the cause of action accrued and after a count charging common law negligence had been filed as the declaration in the case; and also that the act of 1903, under which the two additional counts were drawn and filed, was repealed expressly and by revision without a saving clause by the act of 1907, and therefore the right of recovery for violation of the former act was lost by its repeal.

Appellee raised the first question in the trial court by the plea of the statute of limitations and obtained there an adverse decision, which he does not here question by filing a cross error. We do not see how it can be said to be before us for decision. Our supreme and appellant courts have many times disposed of similar questions on the mere statement that no cross error was filed, often without any discussion or citation of authorities, but in Pelouze v Slaughter, 241 Ill. 215, 224, the purpose of the statutory assignment of cross error and consequence of failing to observe it is fully discussed with citation of many authorities. The court said- " If one party appeals the opposite party will be considered as acquiescing in all rulings of the trial court, unless his objections thereto are presented in some proper manner," and points out

the necessity of assigning cross error in cases where a party does not desire a reversal of a decree or judgment. In addition to the authorities there cited see Stowell v Spencer, 190 Ill. 453; Provart v. Harris, 150 Ill. 40; The People v Sholem, 238 Ill. 203; Meyer v Meyer, 247 Ill. 535; City of Hillsboro v Grassel, 249 Ill. 190; Forcum v.Brown, 251 Ill. 301; Village of Shumway v Leturno, 225 Ill. 601. But whether appellee was at the time of the judgment entitled to recover on proof or admission of the facts alleged in either or both of the two additional counts is ~~perhaps~~ material. While the trial court held them good on demurrer and also as against a plea of the statute of limitations, still if there was no statutory law making the conduct complained of actionable they may stand as immaterial allegations of fact upon which a judgment could not be entered.

The Motor Vehicle act of 1907 was no doubt intended as a revision of the act of 1903. It repeated in section 12 section 2 of the former act,and substituted for section 3 different regulations as to speed at which a motor vehicle might be lawfully driven on a public highway. It in express terms repealed the act of 1903 with no saving clause. Later in 1911 an act on the same subject was passed (J & A. Stats. Par 1301,et seq)which the court held in People v Sargent, 254 Ill. 514, was intended to supercede all previous legislation on that subject. That act contained a saving clause, and it is not contended that it affects any question arising

in this case. The question is whether after the repeal of the act of 1905 a plaintiff may recover under the provisions of that act in a suit begun before the repeal for an injury sustained while the act was in full force. This question involves the consideration of many cases of this and other states on the consequence of the repeal in different ways of a statute, and on the effect of the provisions in relation to repeals and saving of rights of action accruing theretofore in chapter 131 of our statutes (J & A. Stats. Vol. 6, Par. 11105) These questions were so thoroughly discussed in Merlo v Coal & Mining Co., 258 Ill. 328 and the authorities in this and other jurisdictions so extensively reviewed that we need not extend this opinion by a repetition of what is there said. For reasons there stated we are of the opinion that the act of 1907 repealing the act of 1905 cannot be held to deprive appellant of her cause of action under either of the sections of the act of 1905 relied on in the additional counts of her declaration. As we understand the law, we are not permitted to disregard the two additional counts or to consider whether the court erred in holding them good against the plea of the statute of limitations. The injury complained of occurred and the suit to recover was brought and additional counts filed before the statute was repealed. The defendant raised the question of the existence of the statute and rights accruing under it by demurrer to the additional counts, and then waived the demurrer by pleading to the counts, and no question is raised here as to the action of the court in overruling the demurrer or sustaining the plea of the statute of limitations. We are of

the opinion, as before expressed, that appellant's right of action survived the repeal and have not considered whether the court erred in holding the additional counts good against the plea of the statute of limitations.

Appellant also objects to certain instructions that they left the jury to determine the materiality of facts; that they did not confine the inquiry as to negligence to at or near the time and place of the accident; that they left the proposition that the plaintiff must recover under her declaration, or some count thereof, in doubt by the use of ambiguous language. There is some ground for these criticisms. We conclude that the judgment must be reversed because of what we regard the principal error in ignoring the two additional counts in the instructions to the jury, and will not discuss in detail other objections to the instructions.

Appellee cross examined a material witness by calling her attention to testimony that she had given on another trial, which was claimed to be in conflict with what she was there stating, and in his argument to some extent treated her answer that " she did not remember", or something to that effect, as equivalent to an admission that she made those statements, and perhaps was permitted to go further on that line of argument than he should have done without making proof by way of impeachment that she did on the other trial make those statements. The rule is that when a witness

neither directly admits nor denies the acts or declaration, as when he merely says he does not recollect, or gives any other indirect answer not amounting to an admission, it is competent to the adversary to prove the affirmative and we do not understand that without so proving the affirmative he should be permitted to assume that such contradictory statements had been made by the witness. We need not go further into this question as it can easily be avoided on another trial by following the rule permitting proof of such statements as above noted. (Ray v Bell, 34 Ill. 444; I.C.R.R.Co., v Wadsm 206 Ill. 523; Chicago City Ry. Co. v Matthieson, 212 Ill. 292. The judgment is reversed and the cause remanded.

Reversed and remanded.

6108

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 303

BE IT REMEMBERED, that afterwards, to-wit: on

APR 14 1916

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

~~Gen.~~ No. Gen. No. 6108

Michael Dinneen, appellee

vs Appeal from LaSalle.

City of Ottawa, appellant.

Carnes, J.

Michael Dinneen the appellee was injured December 29, 1910, by stepping into a hole in a street near the sidewalk in the city of Ottawa and sued the city to recover for that injury, and had a verdict and judgment for $725.00. The city prosecutes this appeal and relies for reversal solely on the claim that the evidence does not show either negligence on the part of the defendant or due care on the part of the plaintiff. No error is claimed in rulings on the evidence, or giving or refusing of instructions, or as to the amount of the verdict if appellee is entitled to recover;

~~Appellee~~ Plaintiff was at the time of the injury a man about seventy years old. He had lived in Ottawa a great many years and had been, for a number of years, a member of the city council, his last term of office expiring about eight months before the accident, a part of the time serving as chairman of the street and alley committee, and a part of the time as a member of the sidewalk committee.

At the northwest corner of Columbus and Joliet streets there was a hole, or excavation, near the angle made by the sidewalks where years before a catch basin for the sewer had been put in there and the hole left open. There was no guard protecting the hole. There would be little danger from it in the daytime. A pedestrian would not fall into it if he kept on the sidewalk as he turned the right angle to cross the street. The accident happened at about eleven o'clock of a dark night. The street was dark at that place

Ben. Ex. Sup. No. 6100

Michael Dinneen,

Appellant from Ont. S.C.

v.

City of Ottawa, Respondent.

Ontario, J.

Michael Dinneen the appellee was injured December 1st, 1920, by stepping into a hole in a street near the sidewalk in the city of Ottawa and brought this action to recover for that injury, and had a verdict and judgment for $750.00. The city prosecutes this appeal and relies for reversal solely on the claim that the evidence does not show either negligence on the part of the defendant or due care on the part of the plaintiff. No error is claimed in rulings on the evidence, or giving or refusing of instructions, or as to the amount of the verdict if appellee is entitled to recover.

Appellee was at the time of the injury a man about seventy years old. He had lived in Ottawa a great many years and had been, for a number of years, a member of the city council, his last term of office expiring about eight months before the accident, a part of the time serving as chairman of the street and alley committee, and a part of the time as a member of the sidewalk committee.

At the northwest corner of Columbus and Gollet streets there was a hole, or excavation, near the angle made by the sidewalks where years before a catch basin for the sewer had been put in there and the hole left open. There was no guard protecting the hole. There would be little danger from it in the daytime. A pedestrian would not fall into it if he kept on the sidewalk as he turned the right angle to cross the street. The accident happened at about eleven o'clock of a dark night. The city at one time had at least some

Plaintiff ~~Appellee~~ was walking north on Columbus street and intending to turn at a right angle and go east and walk on Joliet street. He mistook the place, and turned just before reaching the walk, falling into the hole and thereby receiving the injury complained of. The ground was hard and level at the place where he turned, and he thought he was still on the walk He had theretofore been accustomed to walk to his home in this direction on Columbus ~~xxxxx~~ and Joliet streets, but had habitually used the other side of the street. It is argued that from the fact of his long use of these streets he must have known of the excavation and therefore was bound to avoid it. This was a question for the jury and their conclusion that he might not have known it or might, in the exercise of due care, have forgotten it, should not be disturbed by us. It is urged that because of his connection with the city council he should have known of this defect, and that he is suffering from a neglect of his own duty as a member of the council, and should not be heard to complain. The fact that his past duties were such as to give him knowledge and notice of the conditions of the street was for the jury to consider in determining whether he was in the exercise of ordinary care/ There is no foundation in law or reason for an assumption that a member of a city council must, at his peril, leave all the streets and walks of the city in safe condition when he retires from office. It is clear that the excavation was one that in the exercise of ordinary care the city should have covered ~~and~~ guarded. Inpermitting it to remain ~~it~~ that place for so long a time it was guilty of actionable negligence and charged with notice of the condition. Whether appellee was in the exercise of ordinary care for his own safety was a fair question

to turn at a right angle and to cast his mind on Joliet street. He mistook the place, and turned just before reaching the walk, falling into the hole and thereby receiving the injury complained of. The ground was hard and level at the place where he turned, and he thought he was still on the walk. He had therefore been accustomed to walk to his home in this direction on Columbus Street and Joliet streets, but had habitually used the other side of the street. It is argued that from the fact of his long use of these streets he must have known of the excavation and therefore was bound to avoid it. This was a question for the jury and their conclusion that he might not have known it or might, in the exercise of due care, have forgotten it, should not be disturbed by us. It is urged that because of his connection with the city council he should have known of this defect, and that he is suffering from a neglect of his own duty as a member of the council, and should not be heard to complain. The fact that his past duties are such as to give him knowledge and notice of the conditions of the street was for the jury to consider in determining whether he was in the exercise of ordinary care. There is no foundation in law or reason for an assumption that a member of a city council must, at his peril, leave all the streets and alleys of the city in safe condition when he retires from office. It is clear that the excavation was one that in the exercise of ordinary care could not be seen and guarded against.

Impermitting it to remain at that place for so long a time it was guilty of actionable negligence and charged with notice of the condition. Whether exercise in the exercise of ordinary care for his own safety was a fair question

for the jury, and we are of the opinion that their conclusion was not so unreasonable as to permit either the trial court or this court to disturb their finding. The judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6149

1525

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

2001.A.320

R H Dun May 24. 1916

BE IT REMEMBERED, that afterwards, to-wit: on APR 14 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8149

Richard J. Blemaster, appellee

vs Appeal from Stephenson.

Thomas Rookey, appellant.

Carnes, J.

In November 1910, the ~~appellee, Richard J. Blemaster~~ plaintiff purchased from the ~~appellant, Thomas Rookey,~~ defendant a residence property in the city of Freeport, and in consideration therefor conveyed him an equity in an eighty acre tract of land in Michigan, and paid him $3300.00. ~~Appellee~~ Plaintiff obtained a loan of the $3300.00 by mortgaging the Freeport property. February 21, 1911, he executed a warranty deed of that property to ~~appellant~~ defendant for an expressed consideration of $4300.00. This deed was never recorded, and ~~appellee~~ plaintiff testified that it was executed as a security for a $800.00 obligation incurred for him by the ~~appellant~~ defendant. In May 1913, ~~appellee~~ plaintiff executed another warranty deed of the premises, which was delivered to the ~~appellant~~ defendant. The consideration expressed in the deed was $4500. and it recited that the grantee assumed and promised to pay mortgage encumbrances of $3300.00 and $100.00 respectively ~~Appellee's~~ plaintiff's claim ~~is~~ was that this last conveyance was made in pursuance of an oral agreement that he would convey the premises to ~~appellant~~ defendant and pay him $400.00 in money, and that ~~appellant~~ defendant should assume and pay the mortgage indebtedness and convey to ~~appellee~~ plaintiff the equity in the eighty acre tract of land in Michigan and cancel ~~appellee's~~ plaintiff's two notes of $100. and $300 respectively, which ~~appellant~~ defendant had discounted at a bank; that he executed and delivered the deed and afterwards tendered appellant $400. but ~~appellant~~ defendant refused to accept the money and refused to convey the Michigan property, and failed or refused to cancel or cause to be cancelled the two notes; whereupon ~~appellee brought this suit in assumpsit to~~ plaintiff

No. 19. 2115

Richard J. Blamester, appellee

vs. Appeal from Grayhamson.

Thomas Thomsby, Appellant.

Sutton, J.

In December 1911, the appellee, Blamester, purchased from the appellant, Thomas Thomsby, a residence property in the city of Freeport, and in consideration therefor conveyed him an equity in an eighty acre tract of land in Michigan, and paid him $3800.00. Appellee obtained a loan of the $3800.00 by mortgaging the treasurer property. February 21, 1911, he executed a warranty deed of that property to appellant for an expressed consideration of $4200.00. This deed was never recorded, and appellee testified that it was executed as a security for a $800.00 obligation incurred for him by the appellant. In May 1913, appellee executed another warranty deed of the premises, which was delivered to the appellant. The consideration expressed in the deed was $4200, and it recited that the grantee assumed and promised to pay mortgage encumbrances of $3800.00 and $100.00 respectively. Appellee's claim is that this last conveyance was made in pursuance of an oral agreement that he could remain in possession of the premises and pay the mortgage indebtedness and convey to appellee, the equity in the eighty acre tract of land in Michigan and cancel appellee's two notes of $100 and $800 respectively, which appellant had discounted at a bank; that he executed and delivered the deed and appellee accepted it upon the agreement that he would pay the money and refused to convey the Michigan property, and failed or refused to cancel or return to the appellee the notes

recover the market value of his equity in the Freeport property at the time of the conveyance in May 1913, and had verdict and judgment for $1500.00. The defendant appeals.

~~Appellant's~~ claim ~~is~~ that ~~appellee~~ was involved in debts and financial difficulties and he was endeavoring to aid him and for that purpose took the deed of the Freeport property and assumed the mortgage indebtedness thereon that the creditor might have the benefit of his responsibility; that nothing was said about the Michigan land or about ~~appellee's~~ paying him $400 at that time; that he had at other times offered to convey the Michigan property for $400 and at one time had a deed executed to be delivered on payment of that sum, but the money was never offered him; that he held the deed of the Freeport property as a mortgage and there was never any agreement, intent, or purpose that it should operate as a conveyance evidencing a bargain and sale. He ~~said~~ not deny ~~appellee's~~ plaintiff's statement that the prior deed of February 21 1911, was intended as a mortgage, but insists that it operated as an estoppel on ~~appellee~~ plaintiff to claim that the later deed was to convey the title. ~~We see no good ground for this contention.~~

The jury were compelled to choose which of the radically conflicting statements of the transaction was entitled to belief. Each party testified to his version of the matter, and was to some extent corroborated by other evidence, and facts and circumstances proven. There was an attempt to impeach appellant as a witness by proof that his reputation for truth and veracity was bad, and witnesses were introduced by him to prove a good reputation. The impeaching evidence taken together, warranted the jury in looking with some suspicion upon appellant as a witness in his own behalf. They evidently believed appellee's statement. The trial court was

[illegible] the property value of his equity in the Hungry property at the time of the conveyance in May 1913, and had verdict and judgment for $[illegible]. The defendant appeals.

[illegible] claim [illegible] transactions involved in both and financial difficulties and he was endeavoring to sell the and for that purpose took the deed of the Ferguson property [illegible] learned the morning [illegible] that the creditor might have the benefit of his responsibility; that nothing [illegible] said about the Whitman land or about [illegible] mortgage at that time; that he had no other items collected to convey the Michigan property for $400 [illegible] at one time had a deed executed to be delivered on payment of that sum, but the money was never delivered him; that he held the deed of the Ferguson property as a mortgage and there was never any agreement, intent, or purpose that it should operate as a conveyance evidencing a bargain and sale. He [illegible] not have [illegible] statement that the prior deed of February 21 1911, was intended as a mortgage, but insists that it operated as an absolute conveyance to claim that the later deed was to convey the title. [illegible]

The jury were [illegible] to choose which of the [illegible] conflicting statements of the arrangement [illegible] to believe. Each party testified to his version of the matter, and was to some extent corroborated by other evidence, and facts and circumstances proven. There was an [illegible] impression [illegible] for truth and veracity was had, [illegible] by him to prove a [illegible] reputation. The [illegible] leaning to either, [illegible] the jury in [illegible] matter were [illegible] to a minimum in the [illegible]. They evidently believed appellee's statement. The [illegible]

of the opinion that they were within their proper province in so finding the facts, and entered judgment on the verdict We cannot say, from a reading of the record, that error was committed by either ~~party~~ the jury or court in passing upon the facts.

The court at the instance of the plaintiff, gave the jury the following instruction:- "You are instructed that if you believe from a preponderance of all the evidence, that the plaintiff and defendant entered into an oral agreement whereby the plaintiff was to convey to the defendant all his interest in the house and lot in question in this suit, and in addition thereto was to pay the defendant the sum of four hundred dollars and in consideration thereof the defendant agreed to convey to the plaintiff a certain eighty acre tract of land in Michigan, and if you further believe, from a preponderance of all the evidence that the plaintiff did convey the house and lot in question to the defendant and in addition thereto offered to the defendant the sum of four hundred dollars legal tender of the United States of America, and if you further believe, from a preponderance of all the evidence, that the defendant refused to convey to the plaintiff the said eighty acre tract of land in Michigan and refused to accept the said sum of four hundred dollars, then you will find the issues for the plaintiff and assess the plaintiff's damages against the defendant at such sum, if any as you may believe, from a preponderance of the evidence, the fair cash market value of plaintiff's interest in said house and lot in the city of Freeport, at the time of such conveyance thereof, exceeded the incumbrance thereon."

We think this instruction correctly states the law, and it was the only instruction given in the case except as to the

of the opinion that they were within their proper province in so finding the facts, and entered judgment on the verdict [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] committed by either making the jury or court in passing upon the facts.

The court at defendant's request, gave the jury the following instruction:- "You are instructed that if you believe from a preponderance of all the evidence, that the plaintiff and defendant entered into an oral agreement whereby the plaintiff was to convey to the defendant all his interest in the house and lot in question in this suit, and in addition thereto was to pay the defendant the sum of four hundred dollars and in consideration thereof that defendant agreed to convey to the plaintiff a certain eighty acre tract of land in Michigan, and if you further believe, from a preponderance of all the evidence that the plaintiff did convey the house and lot in question to the defendant and in addition thereto offered to the defendant the sum of four hundred dollars legal tender of the United States of America, and if you further believe, from a preponderance of all the evidence, that the defendant refused to convey to the plaintiff the said eighty acre tract of land in Michigan and refused to accept the said sum of four hundred dollars, then you will find the issues for the plaintiff and assess the plaintiff's damages against the defendant at such sum, if any as you may believe, from a preponderance of the evidence, the fair cash market value of plaintiff's interest in said house and lot in the city of Freeport, at the time of said conveyance thereof, subtract the incumbrance thereon."

In this instruction [illegible] [illegible] [illegible] was the only instruction given [illegible] [illegible]

form of verdict.

Appellant's contention is based on his version of the transaction. Assuming that to be true, he insists that the case should have been transferred to the chancery side of the court for an investigation there as to the amount of the indebtedness and the right of appellee to redeem. He endeavored during the trial to have the case so transferred. His error lies in the assumption that his statement of facts must be taken as true. A vendee sued at law for the purchase price of real estate cannot transfer the action to the equity side of the court by pleading and attempting to prove that the deed was given as a mortgage unless he succeeds in establishing the truth of his statements.

A query may occur whether the measure of damages was the market value of the equity conveyed by appellee, or the value of what appellant agreed to give and do in consideration of the conveyance, including the market value of the Michigan land. This question is not much argued, and appellant says it is not in the case. He plead the statute of frauds we suppose with the view of meeting the allegation that he had agreed to convey the Michigan land to appellee. We suppose that agreement was within the statute and therefore unenforceable. Appellant treated it as such. At least he refused to convey the land, which, under the authority of Booker v Wolf, 195 Ill. 365, terminated the expressed contract and permitted a suit to recover on an implied agreement.

Evidence was introduced as to the market value of the Freeport property at the time in question. The opinions, as is usual in such cases, varied; but taken together the evidence sustains the verdict based on that testimony as to value.

There is a great amount of special pleading in the record

form of verdict.

Appellant's contention is based on his version of the transaction. Assuming that to be true, he insists that the case should have been transferred to the chancery side of court for an investigation there as to the amount of the indebtedness and the right of appellee to redeem. He endeavored during the trial to have the case so transferred. His answer lies in the assumption that his statement of facts must be taken as true. A vendee sued at law for the purchase price of real estate cannot transfer the action to the equity side of the court by pleading and attempting to prove that the deed was given as a mortgage unless he succeeds in establishing the truth of his statements.

A query may occur whether the measure of damages was the market value of the equity conveyed by appellee, or the value of what appellant agreed to give and do in consideration of the conveyance, including the market value of the Michigan land. This question is not much argued, and appellant says it is not in the case. He plead the statute of frauds we suppose with the view of meeting the allegation that he had agreed to convey the Michigan land to appellee. We suppose that agreement was within the statute and therefore unenforceable. Appellant treated it as such. It least he refused to convey the land, which, under the authority of Beeson v. Dell, 122 Ill. 626, terminated the property contract and permitted a suit to recover on an implied agreement.

Evidence was introduced as to the market value of the property, exactly as the law requires. The evidence, as is usual in such cases, varied; but there was in the evidence sustaining the verdict based on such testimony is to value.

There is a great amount of [illegible] in the record

and arguments based thereon that we have some difficulty in following. The common counts and the general issue are part of the pleadings. So far as we can see all evidence in behalf of defendant that could have been admitted under any special plea was permitted to go to the jury. There may have been error in refusing defendant leave to file pleas and in sustaining demurrers to pleas, but as appellant was not deprived in the introduction of evidence, or in the instruction to the jury of any legal right to which he was entitled under the facts, we are not inclined to discuss the action of the court in ruling upon special pleas. He was not injured and should not be heard to complain. (Hartford Fire Ins. Co. v Olcott, 97 Ill. 439; Harrison v Thackaberry, 248 Ill. 512, 516; Tokheim Manufacturing Co. v Stoyles, 142 Ill. App. 198). Finding no reversible error in the record the judgment is affirmed.

Affirmed.

and arguments based thereon did not have very difficulty in following. The common counts on [illegible] issues are part of the pleadings. So far as [illegible] the [illegible] evidence in behalf of defendant that could have been admitted under any special plea was permitted to go to the jury. There may have been error in allowing defendant leave to file plea and in sustaining demurrers to them, but no complaint may not derived in the introduction of evidence, or in the instruction to the jury of any legal right to which he was entitled under the facts, he can not insisted to discuss the action of the court in ruling upon special pleas. He was not injured and should not be heard to complain. (Hartford Fire Ins. Co. v Olcott, 97 Ill. 439; Mc Cann v Chamberlaney, 98 Ill. [illegible]; Tyson [illegible] v Griffith, [illegible] Ill. 149). Finding no reversible error in the record the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

Clerk of the Appellate Court.

6178

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I A 338

BE IT REMEMBERED, that afterwards, to-wit: on APR 14 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6178.

Evalyn Kingman, appellee

vs Appeal from Peoria.

Louis Kingman, appellant.

Carnes, J.

This is an appeal from an order committing the appellant Louis Kingman, to jail for contempt of court in default of payment of installments of temporary alimony therefore ordered in a suit for separate maintenance begun April 9, 1913, by his wife, Evalyn Kingman, the appellee, and from the refusal of the court to set aside or modify said prior order and reduce the amount of payments to be required in the future.

The parties were married in June 1906. Appellee filed a bill in chancery for separate maintenance in September 1908. The records in that suit and two collateral matters were before this court and opinions filed in October 1909, reported in 150 Ill. App. 456, 462, 466. After the final determination of those suits counsel say she filed another bill for separate maintenance which was dismissed by her. Then followed the bill in this case and a petition for temporary alimony. The court after a hearing on the petition, on November 13, 1914, ordered appellant to pay for the support and maintenance of appellee during the pendency of the suit $20.00 per week until the further order of the court. Afterwards May 27, 1915, appellee filed a petition alleging that said weekly payments had been made up to April 24, 1915 and that none had been made thereafter, and asked for a rule on appellant to show cause why he should not be attached for contempt of court. The rule was entered and appellant on June 14, 1915, filed his answer stating in much detail

No. [illegible].

Evelyn Kingman, [illegible],

vs. Appeal from Peoria.

Leslie Kingman, appellant.

Mr. Justice, J.

This is an appeal from an order committing the appellant Leslie Kingman, to jail for contempt of court in failure of payment of installments of temporary alimony theretofore entered in a suit for separate maintenance begun April 4, 1922, by his wife, Evelyn Kingman, the appellee, and from the refusal of the court to set aside or modify said prior order and reduce the amount of payments to be required in future.

The parties were married in June 1908. A decree nisi was filed in chancery for separate maintenance in September [illegible]. The records in that suit and two collateral matters were before this court and opinions filed in October 1922, reported in 290 Ill. App. 488, 492, 498. After the final disposition of those suits [illegible] by the filing another bill for separate maintenance which was dismissed by her. Then followed the bill in this case and a petition for temporary alimony. The court entered a decree on the petition, on November 16, 1924, ordering [illegible] to pay for the support and maintenance of [illegible] during the joint lives of the [illegible] $20.00 per week until the further order of the court. After [illegible] May 27, 1926, [illegible] petition alleging that said weekly payments had been [illegible] up to April 16, 1926 [illegible] had been made thereafter, and asked for a rule [illegible] to show cause why he should not be attached for [illegible] of court. The rule was issued [illegible] on June 10, 1926 [illegible] in such [illegible]

his pecuniary condition and inability to make the required payments. Briefly stated, it appears from the answer and the evidence that at the time the order for temporary alimony was entered appellant was in receipt of a salary of $1000.00 per year from the Kingman Plow Company, and a salary of $1000.00 per year as a trustee under the last will and testament of his father, Martin Kingman, deceased; and that it was upon the basis of that income that the order to pay $20.00 per week was entered; that he then had no other source of income and no property except his interest in the estate of his father; that the estate had become much involved in debt and financial difficulties; that the trustees of the estate and members of the Kingman family had been compelled to negotiate with creditors and arrange the affairs somewhat to their dictation; that appellant was obliged to relinquish his two salaries and join with the other members of his family in incurring personal obligations for the payment of the debts, and that the whole family were in a struggle to preserve the Kingman estate from destruction; that he had no means of complying with the order, and therefore had not made the required payments. He asked that the rule against him be discahrged and prayed that the answer be taken as a petition and that the court should vacate and set aside or modify the order theretofore entered, or at least reduce the amount of such payments to be made in the future. The court, on a hearing of evidence, which is preserved in the record, entered an order July 12, 1915 (computing the weekly payments to the time of the order) finding appellant $230.00 in arrears and ordering that he pay that amount, which appellant failing to do he was held guilty of contempt of court and ordered committed to the county jail for the term of thirty days "and until he be discharged by due process of law" or released on compliance with the order from which

a pecuniary condition and inability to make the required payments. Briefly stated, it appears from the answer and the evidence that at the time the order for temporary alimony was entered [illegible] was in receipt of a salary of $1000.00 per year from the Kingman Plow Company, and a salary of $1000.00 per year as a trustee under the last will and testament of his father, Martin Kingman, deceased; and that it was upon the basis of that income that the order to pay $40.00 per week was entered; that he then had no other source of income and no property except his interest in the estate of his father; that the estate had become much involved in debt and financial difficulties; that the trustees of the estate and members of the Kingman family had been compelled to negotiate with creditors and arrange the affairs somewhat to their detriment; that [illegible] was obliged to relinquish his two salaries and join with the other members of his family in incurring personal obligations for the payment of the debts, and that the whole family were in a struggle to preserve the Kingman estate from destruction; that he had no means of complying with the order, and therefore had not made the required payments. He asked that the rule against him be discharged and prayed that the answer be taken as a petition and that the court should vacate and set aside or modify the order heretofore entered, or at least reduce the amount of such payments to be made in the future. The court, on a hearing of evidence, which is preserved in the record, entered an order [illegible] (reducing the monthly payments to the time of trial) leaving [illegible] in arrears and unpaid, and [illegible] that amount, which he [illegible] failing to do [illegible] of contempt of court [illegible] committed to the county jail [illegible] from which [illegible]

order this appeal is prosecuted.

The court refused to act on the petition to modify the order apparently on the theory that appellant had no standing to ask any relief while he stood in contempt for failure to comply with the order to pay the past due alimony.

Much of the history of these parties recited in our opinions before referred to appears or may be fairly inferred from the record before us. Martin Kingman was a man of reputed great wealth, who died in 1904. He carried life insurance from which appellant got a considerable sum shortly after his father's death. Appellant had other property at ~~the~~ that time which he had quite likely acquired because of his connection with a wealthy family. He had an income derived from salaries paid him as an officer of the different companies in which his father was interested. The father's property was placed in trust and there was supposed to be a large amount coming to appellant at the termination of the trust, December 19, 1914. At the time of their marriage appellee supposed that appellant was a very wealthy man, and he with apparent reason, believed that he was. They each had extravagant tastes and the available funds of appellant were soon dissipated. The trust estate left by Martin Kingman became involved in debt and financial difficulties, and passed largely under the control of creditors. Whether the Kingman net estate is of any value cannot now be definitely stated, but there is no question that it is in a condition that every party interested in it as beneficiary or creditor must be diligent in its preservation. Under such conditions salaried officers whose services can be dispensed with are not permitted to hold their offices and draw their salaries. We are of the opinion that appellant was not deprived of his salary and means of supporting himself and his wife from any

order this appeal is prosecuted.

The court refused to set aside the petition to modify the order, apparently on the theory that appellant had no standing to ask any relief while he stood in contempt for failure to comply [illegible].

[illegible] puted great wealth, who died in 1926. He married Lila Ingersoll [illegible] for a considerable sum shortly after his father's death. A [illegible] had other property at the time in that time which he had quite likely acquired because of his connection with a wealthy family. He had an income derived from salaries paid him as an officer of the different companies in which his father was interested. The father's property was placed in trust and there was supposed to be a large amount coming to appellant at the termination of the trust, December 10, 1934. At the time of their marriage appellee supposed that appellant was a very wealthy man, and [illegible] with good reason, believed that he was. They soon had extravagant tastes and the available funds of [illegible] were soon dissipated. The trust estate left by Martin Ingersoll became involved in debt and financial difficulties, and passed largely under the control of creditors. Whether the Ingersoll estate is of any value cannot now be definitely stated, but there is no question that it is in a condition that [illegible] any party interested in it is sufficiently [illegible] to diligent in its prosecution. Under such conditions salaried officers whose services can be [illegible] with the [illegible]

~~other than legitimate business motives.~~ So far as the record shows there are no children born of the marriage and in the present condition of the Kingman estate it is not only proper but very necessary that both of the parties to ~~the~~ this litigation should learn to live in a much less expensive manner than was anticipated at the time of the marriage or necessary even at the time that the order for temporary alimony was entered. While $20.00 a week is no doubt a very moderate allowance for the wife of a wealthy man and may have been proper for the wife of a man with an income of $2000.00 a year and no other property, though it is beyond what is usually given under such circumstances, it should not be expected from a man of no property and no income struggling to save a large estate from financial disaster. The wife is entitled to the allowance because she is the wife and shares the fortunes of her husband, and she is under as much duty to fit herself to changing circumstances as is the husband. On the record before the court an allowance of $5.00 a week was sufficient under the then existing circumstances. The rule is that the allowance should be made with a view to the income of the husband, and when it will result in diminishing the estate from which the income is derived it will not ordinarily be permitted to extend beyond providing for the actual wants and necessities of the wife. (Harding v Harding, 144 Ill. 503; Harding v Harding, 180 Ill. 481,582.) There is no question that the order for alimony is under the ~~control~~ constant control and supervision of the court and may be changed from time to time as conditions change. In Welthy v Welthy 195 Ill. 335, Cole v Cole, 148 Ill. 19 and authorities there cited, and in many other Illinois cases the power of the court to control and change orders entered

for payment of permanent alimony is recognized and discussed. and with some exceptions that need not be noted here, it is settled law that the court may, from time to time, make such orders as the exigencies of the case require. We assume that while it is true that appellant is now earning no salary and has no income and is devoting his energies to the preservation of the Kingman estate with the hope of enabling himself in the future to have a considerable property and enjoy a substantial income, yet that he is a man of sufficient ability so that he can in some way earn something for the support of himself and his wife. It is to be presumed that she is an intelligent woman with some capacity to contribute something to her own support. She must at least in this period of financial misfortune make sacrifices that are required of all people under such conditions. Appellant had paid the installments of alimony to April 24, 1915. He filed his answer and petition for a modification of the order June 14, 1915. There was then about seven weeks or $140.00 of payments in default. Whether the court should have relieved appellant from the payment of installments due before he asked for relief presents a question that we will not decide because the amount is probably within the power of appellant to meet within some reasonable time in the future, but we are of the opinion that the court should have reduced future payments from $20.00 a week to $5.00 a week from and after June 14, 1915, the date of the application for such reduction. We are also of the opinion that the record does not justify the order committing appellant for contempt of court for failure to make the deferred payments. That order is reversed and the cause remanded with directions to modify the order for temporary alimony so that appellant is required to pay

for payment of permanent alimony is accomplished [illegible]
and with some exceptions that need not be noted here, it is
settled law that the court may, from time to time, make such
orders as the exigencies of the case require. We assume that
while it is true that appellant is now earning no salary
and has no income and is devoting his energies to the preser-
vation of the Kingman estate with the hope of enabling him-
self in the future to have a considerable property and enjoy
a substantial income, yet that he is a man of sufficient ability
so that he can in some way earn something for the support
of himself and his wife. It is to be presumed that she is an
[illegible]
to her own support. She must at least in this period of
financial misfortune make sacrifices that are required of all
people under such conditions. Appellant had paid the install-
ments of alimony to April 24, 1918. He filed his answer
and petition for a modification of the order June 14, 1918.
There was then about seven weeks or $140.00 of payments in
default. Whether the court should give relief [illegible]
from the up payment of instalments due before he asked for
relief presents a question that we will not decide because
the amount is probably within the power of appellant to meet
within some reasonable time in the future, but we are of
the opinion that the court should have reduced future pay-
ments from $20.00 a week to $3.00 a week from and after
June 14, 1918, the date of the application for such reduction.
We are also of the opinion that the record does not justify
the order committing appellant to contempt of court for
failure to make the deferred payments. We cannot see no material
one be cause remanded with directions to modify the order
for temporary alimony so that appellant is required to pay

only $5.00 a week from and after June 14, 1915. The enforcement of the payment of the amounts here indicated must depend upon conditions hereafter arising from which the ability of appellant to pay may be shown and ascertained.

Reversed and remanded with directions.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 339

RH Dec May 12/16

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8198.

Matthew Donaghue, appellee

vs Appeal from LaSalle.

Edward J. Fraikin, appellant.

Carnes, J.

Matthew Donaghue, the appellee, was riding along a public highway north of Ottawa just after dark July 9, 1909 driving a single horse attached to a top buggy. He was in a beaten path a little to the side of the center of the road because the center had been recently graded. As he was passing the premises of Edward J. Fraikin, the appellant, his buggy ran over a cow lying in the road and was overturned. Appellee was injured quite seriously, both bones of his ankle were broken, - a compound, comminuted fracture. He was confined to his house for a long time suffering considerable pain and incurring considerable expense for doctors' bills. His injuries are to some extent permanent. He brought this action to recover for that injury and had verdictend judgment for $5 0. 00, from which judgment the defendant appeals.

The issues of fact were stated to the jury at the instance of the defendant in the following instruction:-

"The court instructs the jury that before they can find the defendant guilty, theymust believe, from a preponderance of the evidence,

First, that the plaintiff received the injuries complained of by him by having his buggy upset or overturned by a cow lying in the public highway:

Second, that the plaintiff himself was not guilty of a want of ordinary care for his own safety:

Third, that the defendant was the owner of said cow:

Fourth, that the defendant carelessly, negligently or unlawfully

Can. No. 1224.

Matthew Donaghue, appellant,

vs. Appeal from Lacrosse.

Edward J. Franklin, respondent.

Curtis, J.

Matthew Donaghue, the ~~plaintiff~~, was riding along a public highway north of Ottawa just after dark July 5, 1888 driving a single horse attached to a top buggy. He was in a beaten path a little to the side of the center of the road because the center had been recently graded. As he was passing the premises of Edward J. Franklin, the ~~defendant~~, his buggy ran over a cow lying in the road and was overturned. ~~Appellant~~ was injured quite seriously, both bones of his ankle were broken, - a compound, comminuted fracture. He was confined to his house for a long time suffering considerable pain and incurring considerable expense for doctors' bills. His injuries are to some extent permanent. He brought this action to recover for that injury and had verdict and judgment for $3,000. Co. ~~from which judgment the defendant appeals.~~

The issues of fact were stated to the jury at the instance of the defendant in the following instruction:-

"The court instructs the jury that before they can find the defendant guilty, they must believe, from a preponderance of the evidence,

First, that the plaintiff received the injuries complained of by him by having his buggy upset or overturned by a cow lying in the public highway;

Second, that the plaintiff himself was not guilty of a want of ordinary care for his own safety;

Third, that the defendant was the owner of said cow;

Fourth, that the defendant carelessly, negligently, or unlawfully

permitted said cow to run at large on said public highway; and ,

Fifth, that the injury to the plaintiff was one which an ordinary prudent person should have foreseen would likely happen as a consequence of permitting a cow to run at large on a public highway, and unless the jury find from the evidence that the plaintiff has proved each of said requirements by a preponderance of the evidence, the jury should find the defendant not guilty."

There can be little controversy that the evidence sustained affirmative findings on the first and second propositions. There was a decided conflict of evidence as to the third whether the defendant was the owner of the cow. The evidence showed that appellant had anumber of cows kept on his premises; that at different times before the accident they had been pastured in the road. One witness that appeared at the scene of the accident immediately after it happened testified that there ~~was~~ were two cows in the road there that he had before seen in appellant's herd. The doctor that was called to the place said that appellant then and there said he felt sorry to think it was his cow that was the cause of appellee's breaking his leg. It was so dark that appellee did not identify the cow at the time of the accident, but he testified that he had a conversation with appellant ~~after~~ afterwards in which appellant told him that after taking him, appellee, home that night he saw two of his cows coming down the road from the north. This testimony was sufficient if believed by the jury, to support an affirmative answer to the third proposition. It is true that the evidence introduced by appellant indicated very strongly that his cows were in the enclosure that night and that it must have been some-

permitted, said cow to run at large on said public highway; and,

Fifth, that the injury to the plaintiff was one which an ordinary prudent person should have foreseen would likely happen as a consequence of permitting a cow to run at large on a public highway, and which an injury like that from the injuries that the plaintiff had, [illegible] by a trespasser of the defendant, the jury should find the defendant not guilty.

There was a sharply controverted [illegible] evidence and [illegible] findings on the issues submitted. There was a decided conflict of evidence as to the fact whether the defendant was the owner of the cow. The evidence showed that defendant had a number of cows kept on his premises; that at different times before the accident they had been pastured in the road. One witness that appeared [illegible] testified that [illegible] cows in the road. There was also testimony that [illegible] cows in the road [illegible] had to [illegible] such that [illegible] and there said he felt sorry to think it was his cow that was the cause of [illegible] breaking his leg. He was so dazed that [illegible] did not identify the cow as the kind of the [illegible], but he testified that he had a conversation with [illegible] attorney in which [illegible] told him that after taking the [illegible] cows that which he saw in the road [illegible] road [illegible].

[illegible] testimony. It is also [illegible] by a sufficient indicated very strongly that his [illegible] in the proximate that might and that it had been [illegible]

body's else cow that occasioned the injury. But we are satisfied that the evidence sufficiently ~~warrant~~ supports the jury's finding that it was appellant's cow to fo bid the trial court or this court disturbing that finding. We think the jury were warranted in answering the fourth proposition in the affirmative. Appellant's counsel tried the case, as indicated by that proposition, on the theory of cases decided under the act prior to the present act (J. & A. Statutes, Chap. 8, Sec.1, Par. 322.) holding that a domestic animal that has escaped from its enclosure without the owner's fault is not running at large, and they argue the case here as though the present statute, which is somewhat changed in its terms, did not change the rule in those cases. It is said by appellee that decisions under the prior statute are not applicable. Without deciding that question we will assume that they are, and that finding an animal on a public highway, unless the owner knowingly or negligently permits it to be at large, does not make a case of negligence. C. & M. R. W. Co. v Jones 63. Ill. 472; Myers v Lape, 101 Ill. App. 182; Morgan v The People 103 Ill. App. 257. Under that view of the law, which appellant is responsible for in this case, the court properly permitted proof of the custom of appellant permitting his domestic animals to run in the highway, and that they had been seen there unattended at other times shortly before the accident as bearing on the question of his knowledge and care. While there was a conflict of the evidence on this point we think it sustains the finding that appellant negligently knowingly and unlawfully permitted the cow to run at large at that time and place. The fifth proposition was not susceptible of direct proof or opinion evidence. It was a matter for the jury to determine from their knowledge of common affairs. We are entirely satisfied with their con-

[illegible]'s also now that occasioned the injury. But we are satisfied that the evidence substantially warrant supports the jury's finding that it was appellant's duty to do so. The trial court or this court disapproving that finding. We think the jury were warranted in answering the fourth proposition in the affirmative. Appellant's counsel treat the case, as indicated by that proposition, on the theory of cases decided under the act prior to the present act (4. R. A. Statutes, Civ. [illegible], Sec.1, Par. 2.) holding that a domestic animal that has escaped from its enclosure without the owner's fault is not [illegible] at large, and they argue the case here on though the present statute, which is somewhat changed in its terms, did not change the rule in those cases. It is with by appellee that decisions under the prior statute are not applicable, without deciding that question we will assume that they are, and that finding an animal on a public highway, unless the owner in wingly or negligently permits it to be at large, does not make a case of negligence. O. & M. R. W. Co. v Jones [illegible] Ill. 475; Myers v Lego, 101 Ill. App. 128; Brown v The People 108 Ill. App. 327. Under that view of the law, which appellant is responsible for in this case, the court properly [illegible] domestic animals to run in the highway, and that they had been seen there unattended at other times shortly before the accident as bearing on the question of the knowledge and [illegible]. While there was a conflict of the evidence on this point we think it sustains the finding that appellee negligently knowingly and unlawfully permitted the cow to run at large at that time and place. The fifth proposition was answerable of air at proof or opinion evidence. It was a matter for the jury to determine from their knowledge of human nature. We are entirely satisfied with their con-

clusion that a cow permitted to run at large on a public highway in the night time should be reasonably expected to lie down in the road and become a danger and menace to travel.

Appellant complains of the instructions to the jury In plaintiff's given instructions the jury were informed in substance that actionable negligence would arise from the defendant's "negligently and carelessly permitting his cattle to be and remain upon the public highway in the night time" at the place in question. It is said that the declaration charges wilful misconduct and the instruction warrants a recovery for mere negligence and that the instruction does not inform the jury what the facts must be to constitute cattle running at large. The instruction does not much differ from the statement of the law in defendant's instruction above quoted. The defendant asked the court to instruct the jury that the plaintiff could not recover if he "could by the exercise of reasonable and ordinary care have so driven his horse and buggy prior to and at the time in question as to have avoided the accident." The court modified the instruction by inserting the word "just" before the work "prior" so that the jury's attention was directed to the conduct of the plaintiff as he was approaching the cow. We see no error in this as applied to the facts in the case. There was no room for inquiry whether the plaintiff was negligent in [illegible] that road or driving [illegible] horse, or something of that kind that might arise in a case that would call for an inquiry as to the plaintiff's conduct some time before the accident. The evidence showed that the plaintiff had driven to town about two hours before the accident and had drunk a glass of beer there. There is some suggestion in the argument that he may have been intoxicated, though

collision. [illegible] to run at large on a public highway in the night time should be reasonably expected to lie down in the road and become a danger and menace to travel.

Appellant complains of the instructions to the jury. In plaintiff's given instructions the jury were informed in substance that actionable negligence would arise from the defendant's "negligently and carelessly permitting his cattle to be and remain upon the public highway in the night time" at the place in question. It is said that the instruction charges a lawful misconduct and the instruction warrants a recovery for mere negligence and that the instruction does not inform the jury what the facts must be to constitute actual running at large. The instruction does not much differ from the statement of the law in Schendel's instruction [illegible]. The instruction said to instruct the jury that the plaintiff could not recover if he "could by the exercise of reasonable and ordinary care have so driven his horse and buggy prior to and at the time in question as to have avoided the accident." The court modified the instruction by inserting the words "lawful" giving the word "driven" so that the jury's attention was directed to the conduct of the plaintiff as he was approaching the cow. We see no error in this as applied to the facts in the case. There was no room for inquiry whether the plaintiff was negligent in taking that road or driving on a unmanageable horse, or something of that kind. That might arise in a case that would call for an inquiry as to the plaintiff's conduct on the occasion. The evidence showed that the plaintiff had driven to town about two hours before the accident and had drank a glass of beer there. There is some suggestion in the argument that he may have been intoxicated, though

very little ground for such an assumption. The modification of the instruction did not preclude that inquiry by the jury, if, because he was intoxicated he had failed to see the cow he would not have been exercising care at and just before the time of the accident. Other instructions offered by the defendant were refused. So far as applicable they were covered by instructions given. The case was given to the jury under a fall and fair statement of the law, as claimed by appellant. Finding no error in the record the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6219

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 351

BE IT REMEMBERED, that afterwards, to-wit: on APR 1 4 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6319.

John D. Connors, appellant.

vs Appeal from Co. Ct. Will.

Henry Winke, appellee.

Carnes, J.

Appellant John D. Connors, and appellee, Henry Winke, were riding on a public street in the city of Joliet, each driving his own automobile. They met at the intersection of another street and there was a collision in which appellamt's car was injured to the extent, he says, of about $310.00 but much less according to the testimony of appellee's witnesses. He brought this action to recover for that loss and a jury trial resulted in a judgment for the defendant, from which this appeal is prosecuted.

Appellant's main contention is that the verdict is not supported by the evidence. Each of the parties testified on the trial, and made it quite plain, that he was driving his car slowly and with care, and the other party was driving in a reckless manner and entirely responsible for the collision. Each party was corroborated by other witnesses, and there was, as is usual with such accidents, a contrarity of evidence as to what happened, and where and why. It is a surprising trait in human nature that intelligent, truthful witnesses will differ widely in describing a transaction of this kind. It will serve no useful purpose to relate the testimony in detail. Appellant cites several authorities in support of his proposition and when the weight of evidence is clearly and manifestly against the verdict it is the duty of the lower court to grant a new trial, failing in which the judgment will be reversed upon appeal. This is undoubtedly the law, but upon an examination of the record we are of

Jan. 5s. 1917.

Hon. L. Lamont, presiding.

vs Appeal from Co. Ct. Will.

Henry Kline, appellee.

Carnes, J.

Appellant John T. Connors, and appellee, Henry Kline, were riding on a public street in the city of Joliet, each driving his own automobile. They met at the intersection of another street and there was a collision in which appellee's car was injured to the extent, he says, of about $210.00 but much less according to the testimony of appellant's witnesses. We brought this action to recover for that loss and a jury trial resulted in a judgment for the defendant, from which this appeal is prosecuted.

Appellant's main contention is that the verdict is not supported by the evidence. Each of the parties testified on the trial, and made it quite plain, that he was driving his car slowly and with care, and the other party was driving in a reckless manner and entirely responsible for the collision. Each party was corroborated by other witnesses, and there was, as is usual with such accidents, a contrariety of evidence as to what happened, and where and why. It is a surprising trait in human nature that intelligent, truthful witnesses will differ widely in describing a transaction of this kind. It will serve no useful purpose to review the testimony in detail. Appellant cites several authorities in support of his proposition and then the weight of evidence is clearly and manifestly against the verdict if it is the duty of the lower court to grant a new trial, finding in such case judgment will be reversed upon appeal. This is undoubtedly the rule, but upon an examination of the record, we are of

the opinion that the weight is not clearly and manifestly against the weight of the evidence, therefore we would not be justified in reversing the judgment on that ground.

It is argued that the court erred in permitting witnesses other than experts to testify on the question of the amount of damages. We do not see that that evidence, whether proper or improper, affected the question of liability, therefore it is not necessary to discuss that action of the court. It is also urged that the court erred in admitting photographs of the street where the occurrence happened without sufficient proof that they showed the condition at the time of the accident. We find nothing in that testimony that in our opinion influenced the verdict of the jury adversely to appellant. Photographs, diagrams and drawings are often proper, not as evidence within themselves, but for the purpose of enabling the jury to understand and apply the testimony. Reinke v Sanitary District, 260 Ill. 380, 387, and authorities there cited.

One of the grounds upon which a new trial was asked was that of newly discovered evidence ~~xhxx~~ which was largely cumulative in its character and does not seem to be much relied on by appellant. He only abstracts the affidavits as to one of the witnesses and says in the abstract there were similar affidavits as to five other witnesses. No reason is given or suggested why these witnesses were not produced on the trial, therefore the court did not err in disregarding those affidavits.

No complaint is made as to the instructions to the jury. We find no substantial error in the record, therefore the judgment is affirmed.

Judgment.Affirmed.

the opinion that the weight is not clearly and manifestly against the weight of the evidence, therefore we would not be justified in reversing the judgment on that ground.

It is argued that the court erred in permitting witnesses other than experts to testify on the question of the amount of damages. We do not see that that evidence, whether proper or improper, affected the question of liability, therefore it is not necessary to discuss that action of the court.

It is also urged that the court erred in admitting photographs of the street where the occurrence happened without sufficient proof that they showed the condition at the time of the accident. We find nothing in that testimony that in our opinion influenced the verdict of the jury adversely to appellant. Photographs, diagrams and drawings are often proper, not as evidence within themselves, but for the purpose of enabling the jury to understand and apply the testimony. Fonke v Sanitary District, 280 Ill. 380, 387, and authorities there cited.

One of the grounds upon which a new trial was asked was that of newly discovered evidence which was largely cumulative in its character and does not seem to be much relied on by appellant. He only abstracts the affidavits as to one of the witnesses and says in the abstract there were similar affidavits as to five other witnesses. No reason is given or suggested why these witnesses were not produced on the trial, therefore the court did not err in disregarding those affidavits.

No complaint is made as to the instructions to the jury. We find no substantial error in the record, therefore the judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6139

1840

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 1.178

BE IT REMEMBERED, that afterwards, to-wit: on APR 14 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6159

Henry Forbes, appellee

vs Appeal from Livingston.

Celeste A. Davis, appellant.

Niehaus, J.

In this case Henry Forbes, the appellee, recovered a judgment in the Circuit Court of Livingston County, against Celeste A. Davis, appellant for $173. which amount he claimed was due him, as commissions for getting the purchaser for a farm, consisting of 173 acres, which appellant sold.

There is a sharp conflict in the evidence as to the terms of the contract upon which the claim for commission is based. Appellee claims that appellant agreed to pay him a commission of $1. per acre for finding her a purchaser; and that she fixed the price of the farm to be sold, at $130 per acre; while appellant claims, that she agreed to pay the commission named, only upon condition that the purchaser whom appellee should find for her, would pay the price of $130 per acre; and that appellee was not to have a commission unless $130 per acre was paid by such purchaser for the farm.

The evidence tends to show that the purchaser of the farm, to whom appellant finally sold it, for $135 per acre was procured through the instrumentality of appellee; that is to say it was appellee who induced this purchaser to visit appellant and the farm, with a view of buying it. One of appellant's defenses, however, is that before she sold the farm to this party who finally did purchase it, appellee deceived her into believing that this purchaser was not one which appellee had procured for her; but that he had brought with him the person whom he expected to bring about the sale

Gen. To. 6151

Lucy Price, Appellee,

vs Appeal from Livingston.

Celeste A. Davis, appellant.

Mishaus, J.

In this case Henry Torbes, the appellee, recovered a judgment in the Circuit Court of Livingston County, against Celeste A. Davis, appellant for $175. which amount he claimed was due him, as commissions for getting the purchaser for a farm, consisting of 175 acres, which appellant sold.

There is a sharp conflict in the evidence as to the terms of the contract upon which the claim for commission is based. Appellee claims that appellant agreed to pay him a commission of $1. per acre for finding her a purchaser; and that she fixed the price of the farm to be sold, at $150 per acre; while appellant claims, that she agreed to pay the commission named, only upon condition that the purchaser whom appellee should find for her, would pay the price of $150 per acre; and that appellee was not to have a commission unless $150 per acre was paid by such purchaser for the farm.

The evidence tends to show that the purchaser of the farm, to whom appellant finally sold it, for $165 per acre, was procured through the instrumentality of appellee; that is to say it was appellee, who induced this purchaser to visit appellant and the farm, with a view of buying it. One of appellant's defenses, however, is that before she sold the farm to this party who finally did purchase it, appellee deceived her into believing that this purchaser was not one whom appellee had procured for her; but that he had conferred with him the person whom he expected to bring about the sale

of the farm for her; and wanted her to make a contract with him in reference to the matter.

The appellee denies that he made any statements to appellant to that effect; or that he told appellee that this purchaser "was not his man". It became therefore, a question of fact for the jury to passupon, in connection with all the other evidence in the case, and to determine xxxxx where the truth of this matter lay. If it be a fact, that appellee concealed from appellant, by a false statement, that the person who, at that time, was trying to purchase the farm from her, was a purchaser procured by him; and that appellee was threby induced to afterwards sell the farm to him, for less than the amount she would otherwise have exacted, then appellee would not be entitled to recover commissions, even though the terms of the contract were found to be as claimed by him. (Hafner v Herron, 165 Ill. 242.)

Instructions 7, 8 and 9, which were given for appellee, purport to state the facts that would authorize a recovery, and a verdict for appellee; but completely ignore the matter of defense above stated. An instruction which purports to state all the facts necessary to a recovery, and ignores the matter of defense of which there is proof, is erroneous. (Mooney v City of Chicago 339 Ill. 414; Miller v Cinnamon, 168 Ill. 447; Lee v Quirk, 30 Ill. 395.)

For the error indicated the judgment must be reversed and the cause remanded for another trial.

Reversed and remanded.

of the farm for her; she wanted her to make a contract with him in reference to the matter.

The appellee denied that he made any statements to appellant to that effect; or that he told a witness that this purchaser "was not his man". It became therefore, a question of fact for the jury to passupon, in connection with all the other evidence in the case, and to determine which gave the truth of this matter key. If it be a fact, that appellee concealed from appellant, by a false statement, that the person who, at that time, was trying to purchase the farm from her, was a purchaser procured by him; was that appellee not clearly induced to afterwards sell the farm to him, for less than the value? She would otherwise have stated, that appellee could not be entitled to recover commissions, even though he found of the contract were found to be as claimed by him. (Hefner v Lerson, 185 Ill. 344.)

Instructions 7, 8 and 9, which were given for appellee, purport to state the facts that would authorize a recovery, and a verdict for appellee; but completely ignore the matter of defense above stated. In instruction which put onto to state all the facts necessary to a recovery, and ignores the matter of defense of which there is proof, is erroneous. (Mooney v City of Chicago 188 Ill. 114; Miller v Cinnamon, 180 Ill. 417; Dee v Quirk, 80 Ill. 368.)

For the error indicated the judgment must be reversed and the cause remanded (4 Bradwell 1144).

REVERSED AND REMANDED.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

Clerk of the Appellate Court.

61-1

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

200 Ill. App.

BE IT REMEMBERED, that afterwards, to-wit: on APR 14 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6181.

THE JOHNSON OIL REFINING COMPANY, (a corporation) Appellant,	Appeal from Knox County.
-v-	
GALESBURG RAILWAY, LIGHTING & POWER COMPANY, (a corporation), Appellee.	

NIEHAUS, J.

This is a suit commenced by The Johnson Refining Company, appellant, against the Galesburg Railway, Lighting & Power Company, appellee, in the circuit court of Knox county, to recover damages alleged to have been sustained on account of a collision between a street car operated by appellee and an automobile truck belonging to the appellant, appellant claiming that the collision was the result of appellee's negligence.

The case was tried on the first, second and fifth counts of the declaration. The first count charges that the appellee, by its agents and servants, at the time of the collission, failed to have the street car under proper control; the second count avers that appellee, by its agents and servants, failed to give proper warning of the approach of the car; and the fifth count alleges that appellee, by its agents and servants, failed to keep a proper watch and look-out as the car approached the intersection where the collision occurred. There was a jury trial, which resulted in a verdict finding the appellee not guilty. The appellant made a motion for a new trial, which was denied by the court, and judgment was thereupon entered against the appellant

for costs, from which judgment the appellant prosecutes this appeal.

It appears from the evidence that the appellee owns and operates a single track street car line along West Main Street in the City of Galesburg, and that Cedar Street intersects West Main Street at right angles, running north and south; that half a block or about 195 feet east of Cedar Street the street car track forms a loop around a public square, which is used as a switch, and in the usual operation of the street car line the west-bound cars circle around the north side of the square and then wait on Main Street at the entrance to this loop, or switch, for the east-bound cars to pass onto the loop.

On the day of the collision and just before it occurred a west-bound car was standing at the point mentioned on the switch, waiting for the east-bound car to turn onto the switch and clear the track. At the same time appellant's automobile oil truck was standing on the northerly side of West Main Street near the curbing, about 75 feet east of the easterly line of Cedar Street, and about 120 feet west of the standing street car. This truck was a very large one, about 18 feet long, and weighing 8000 pounds. It contained an oil tank 12 feet in length and 4 feet wide. The driver of the oil truck came out of a blacksmith shop, in which he had transacted some business, to start the truck. When he came out he noticed the west-bound car standing on the switch and saw the east-bound car coming along West Main Street. When the east-bound car got to the Cedar Street crossing he started the machine of the truck and then put on his gloves and mounted the truck, and looked back once more after mounting and noticed the west-bound car still standing on the switch. When

the east-bound car passed him he started his truck and drove it west on West Main Street until he got past the middle of Cedar Street, then turned the truck south, making the turn as quickly as he could to cross the street car tracks, but without looking at the approaching street car, which he knew would be along, and without previously indicating that he was about to turn. He had partly crossed the track when the west-bound car struck the truck at a point just in front of the hind wheels, and wrecking it.

The driver of the truck had, previous to his employment by the appellant, been in the employ of appellee, and was familiar with the manner of the operation of appellee's street car line, at the place mentioned, and he had also been connected with the running of the same car which collided with the truck. He admitted that he knew that the car stationed at the switch woul start westerly as soon as the east-bound car passed the switch, but testified that he thought he had sufficient time to make the turn at Cedar Street and to cross the tracks before the street car would reach him, but he did not make any attempt to ascertain whether it would or not.

As to whether appellee's motorman was guilty of the negligence charged in the counts of the declaration upon which the case was tried, and whether the driver of the automobile truck was guilty of contributory negligence which contributed to bring about the collision were questions of fact which can be determined only from the evidence, and the jury was best able to determine these questions. Having seen and heard the witnesses the jury was in the best position to judge of the credibility of the witnesses and of the weight to be given to their testimony, and this court cannot say that the jury should have found differently on the

The east-bound car passed him in [illegible] time, [illegible] and there it went on that [illegible] of [illegible] the middle of [illegible]

[illegible] he could to avoid the car of our friends, but without locking [illegible] the approaching car, which he knew would be along, [illegible] without practically [illegible] that he was about to turn. He had hardly crossed the track when the west-bound car almost the turned on a point just in front of the last wheels, and [illegible] it.

The driver of the [illegible] had, previous to his [illegible] by the [illegible] been in the employ of [illegible], and was familiar with the manner of the crossing of [illegible] of our line, at this place particular, and he had also been connected with the [illegible] that he knew that the car [illegible] the switch would [illegible] at noon on the east-bound car passed the switch, but [illegible] that he thought he had sufficient time to make the turn [illegible] to cross the tracks before the other car would reach him, but he did not make any attempt to [illegible] it.

In [illegible] the [illegible] motorman was guilty of the [illegible] charged in the complaint of the [illegible] upon which the [illegible] was tried, and whether the driver of the automobile [illegible] guilty of contributory negligence which contributed to [illegible] the collision was a question of fact which [illegible] from the evidence, and the jury was [illegible] to determine [illegible] questions. [illegible] seen and heard the approaching car [illegible] the [illegible] position to judge of the possibility of the [illegible] of the motorman [illegible] to be given to [illegible] testimony, and this court cannot say that the jury should [illegible] differently on the

evidence presented. It is a well settled rule that the verdict of a jury should not be disturbed unless it is clearly and manifestly against the weight of the evidence, which is not the case here.

Objection was made by appellant on the trial to the introduction in evidence of sections 15 and 19 of the City Ordinances of the City of Galesburg. Section 15 requires of drivers of vehicles that " in turning while in motion or in starting to turn from a standstill, a signal shall be given by indicating with the whip or hand, the direction in which the turn is to be made;" and section 19 provides that " traffic on the east and west street shall have the right of way over traffic on the north and south streets." There was no error in admitting the sections of the ordinance in evidence.

Under subdivision 9, article 5 and chapter 25 of 1 Jones & Addington's annotated statutes, the City of Galesburg had power to pass ordinances of this character, to regulate the use of streets by vehicles. These sections of the ordinances are reasonable, and the requirements are a proper regulation of traffic on the streets of the city, and if obeyed would undoubtedly promote the safety of vehicles using the streets and perhaps prevent collisions and accidents. A violation of the ordinance was a circumstance proper to be considered by the jury in determining a question of contributory negligence.

A number of objections are made by appellant concerning instructions given for appellee. It is claimed that it was error to give the 7th and 12th instructions for appellee, which are as follows:-

"7. The Court instructs the jury that if you believe from the evidence that the driver of the auto truck in question, as he approached the street car track crossing at Cedar Street on Main Street, would by the exercise of ordinary care, have ascertained that a street car was approaching the intersection of Cedar and Main Street, and would by the exercise of ordinary care, have prevented the auto truck he was driving from passing onto the street car track, and from being struck by the street car at the intersection of said streets, then your verdict must be for the defendant."

"12. The Court instructs the jury, that if you believe from the evidence that the driver of the auto truck in question, by the exercise of ordinary and reasonable care for the safety of the motor truck he was in charge of as he approached the crossing in question, would have seen and known that a car of the defendant was coming, and would have avoided the accident by the exercise of ordinary care on his part, then and in that case, even if you should further believe from the evidence that the defendant's servants in charge of said car, failed to give any signal of the approach of said car to said crossing, yet the plaintiff cannot recover in this suit and your verdict should be for the defendant."

The instructions set forth are not subject to the criticism made by the appellant; they did not take from the jury the consideration of the question of whether or not the truck driver, just before and at the time of the collision, was in the exercise of due care, but submitted the question to the jury whether the exercise of ordinary care on the part of the driver of the auto truck would have required him to ascertain that a street car was

"V. The Court Martial: Sir, what do you believe from the evidence that the driver of the motor lorry in question, on his approaching the corner was taken aback or rather startled on this occasion, should by the exercise of ordinary care, have anticipated that a car was approaching the intersection of Main and Main Street, and could by the exercise of ordinary care, have prevented the motor lorry being driven into the street car at the intersection of said streets. Was you satisfied that he did so?

[illegible] upon the evidence that the driver of the motor lorry in question, by the exercise of ordinary and reasonable care for the safety of the motor lorry he was in charge of, ought to have approached the crossing in question, would have seen and known that a car of the defendant was coming, and would have avoided the accident by the exercise of a duty care on his part, then and in that case, even if you should further believe from the evidence that the defendant's servants in charge of said car, failed to give the signal of the approach of said car as said evidence, you the plaintiff cannot recover in this suit and your verdict should be [illegible]

The interrogatory set forth are not material to the evidence made by the plaintiff; they did not take from the jury the consideration of the question of the amount of the street railway, [illegible] before and at the time of the collision, was in the exercise of due care, but submitted the question to the jury based on the exercise of ordinary care on the part of the driver of the motor lorry would have required him to anticipate that a street car [illegible]

approaching, and whether the exercise of ordinary care on his part would have prevented his driving onto the street car track and have avoided the collision. Instructions of substantially the same import have been repeatedly sustained by our supreme court. (Chicago City Railway Co. v O'Donnell, 208 Ill. 267; McEniry v Tri-City Railway Co., 179 Ill. App. 152; Chicago Union Traction Co., v Dibvig, 107 Ill. App. 644; Scanlon v Union Traction Co., 127 Ill.App. 406; Weber V C.B.& Q.Railway Co., 142 Ill.App. 150.)

Appellant also assigns for error the giving of the 3rd instruction, which is as follows:-

"The Court instructs the jury that in order to entitle the plaintiff to recover in this case from the defendant, two things must concur and appear from a preponderance of the evidence.

First. That such defendant was guilty of negligence which caused the injury complained of, and

Secondly, That the driver of the auto truck in question exercised reasonable and ordinary care for the safety of the auto truck, and of the plaintiff fails to establish both of these essentials by a preponderance of the evidence, your verdict must be for the defendant."

The objection made is that this instruction in no way fixes the time when the driver should have been in the exercise of ordinary care, and that it eliminates entirely the proposition of equal rights at a crossin . In the matter of fixing time, the instruction must be considered with the other instructions given in the case and when read in that connection the time is definitely fixed. Nor does it eliminate the proposition of equal rights of parties at the crossing. Parties are chargedwith the exercise of due care, when driving vehicles over a crossing, as

[illegible] also to defense for error was giving of the [illegible] instruction, which is as follows:-

"The court instructs the jury that if upon the evidence the plaintiff's to recover in this case then the [illegible], the defendant must convince and appear to them to a preponderance of the evidence.

"Negl. - That such defendant was guilty of negligence if [illegible] caused the injury complained of, and

"Second, that the driver of the train failed in exercising ordinary care and diligence to prevent the collision of the auto truck, and that the plaintiff failed to exercise such ordinary care contributing to the collision, and that such failure was the proximate cause of the collision, and unless you find for the defendant."

The objection made to this instruction is to the last clause of the instruction to the effect that if the jury should find that the plaintiff was guilty of negligence, and that it contributed to the injury, that such negligence was the proximate cause of the collision.

The objection made to this instruction is to the last clause of the instruction to the effect that if the jury should find that the plaintiff was guilty of negligence, and that it contributed to the injury, that such negligence was the proximate cause of the collision.

The objection made to this instruction is to the last clause of the instruction to the effect that if the jury should find that the plaintiff was guilty of negligence, and that it contributed to the injury, that such negligence was the proximate cause of the collision.

well as elsewhere.

The objection made to the giving of the 10th instruction for appellee are not tenable, for the reasons above stated.

An objection is also made to a modification by the court of the 12th instruction given for appellant. The instruction does not embody a correct statement of the law, and the modification did nat harm the appellant.

We are of opinion that the instructions, taken together, state the law applicable to this case with substantial correctness, and that no error was committed either inthe giving of instructions nor in the modifications made by the court. The judgment should therefore be affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____.

_____

Clerk of the Appellate Court.

6190

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 335

May 12/16 Pet Denied

BE IT REMEMBERED, that afterwards, to-wit: on APR 14 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Ge. No. 6190.

William Friedberg, Appellant,	)	
-vs-	)	
	:	
Clarence E.DePew, doing business as the "Practical Advertising Company", and John R.Henderson, as Sheriff of Kendall County, Illinois, Appellees.	)	Appeal from Kendall County.

NIEHAUS, J.

In this case, a bill in equity was filed October 14, 1914, by appellant, in the circuit court of Kendall County, to restrain the enforcement of an execution, issued upon a judgment rendered against appellant in the circuit court of Sangamon County. The bill alleges that on or about February 14,1914, the appellee entered into a contract with appellant through appellant's agent whereby appellee, by the name of "Practical Advertising Company", agreed to furnish to appellant certain articles of merchandise, and perform certain acts to benefit appellant's business- the appellant being a merchant in Yorkville, Kendall County, and that appellee guaranteed thereby to increase appellant's business. A copy of the contract referred to is attached to the bill as an exhibit.

The bill further alleges that appellant entered into this contract with appellee, "only in consideration" that appellee should in good faith carry out and perform terms and conditions of the contract on his part; and that appellant's business should be thereby increased over the business of the corresponding months of the preceding year; and that appellee,

through its agent, and otherwise, proposed and guaranteed said increase in business, and proposed said plan solely for the purpose of increasing appellant's business; and that although appellant entered into said arrengement for the sole purpose aforesaid, his bueinss, instead of increasing, decreased during the months the plan was in operation, to the amount of nearly $1000, as compared with the business of the corresponding months of the preceding year; that appellee utterly failed and neglected to perform the terms and conditions of the contract in good faith and thereby also failed to cause any increase in appellant's business, although appellant, on his part, did all in his power to carry out the purpose of said contract.

The bill further alleges that appellee failed and neglected to make up to appellant or to account to him, for the money lost by him as appellee was bound to do by said contract, to the extent of $400. The bill further states that on [illegible] June, 1914, one of the days of the May term of the circuit court of Sangamon county, the appellee as "Practical Advertising Company" procured to be entered, by some means unknown to appellant, a pretended judgment against him in the pretended sum of $440, with costs amounting to $5.40, all without the personal knowledge of appellant; but, as he has since been informed, and upon such information states ~~the~~ ~~fact~~ ~~to~~ it to be a fact; and that on or about July 14, 1914, a pretended execution was issued by the clerk of the circuit court of Sangamon county, upon said pretended judgment; that afterward a pretended execution was placed in the hands of the sheriff of Kendall county, for service, and that the sheriff served the same upon appellant on or about August 14, 1914; and then,

on or about September 30, 1914, levied it upon certain real estate, which is the property of appellant situated in the village of Yorkville, in Kendall county; that this levy by the sheriff was entered of record, and still remains of record, to the prejudice, injury and damage of appellant in his business and reputation, and constitutes a cloud upon his title to the premises levied upon.

The bill also alleges that the appellee proposes and threatens to instruct and direct the sheriff to publicly advertise and sell the premises levied upon under and by virtue of said pretended execution and levy, and that the sheriff threatens to so advertise and sell the same, and thus further cloud appellant's title and further injure him in his business, property and reputation, and that appellant fears they will carry out their threats unless restrained by the order of the court.

The bill also avers that the service of the execution on appellant was the first notice "actual, constructive or otherwise", which appellant had of the existence of the judgment in the Sangamon county circuit court, no summons or other process having been served upon him previous to the entering of the judgment, and that the May term, 1914, of that court had adjourned for the term before the time mentioned, and that it was only from the alleged pretended executionthat he learned that the sum of $440, with interest from June, 1914, had been so recovered against him by appellee in an action of " assumpsit-confession", in the circuit court of Sangamon county, together with costs to the amount of $5.40.

The bill also states that appellant never, to his knowledge, executed or signed any judgment note authorizing the judgment, and that in case such judgment note exists, or ever existed, containing his signature, such signature is a forgery; or, if genuine, it was

obtained by misrepresentation, fraud, false representations and misrepresentation; that the only person presented to the [illegible] approval or execution at the time the contract was negotiated, was represented by [illegible] agent to be a simple contract, and that if such alleged pretended judgment was taken and set [illegible] as indicated by the alleged pretended execution, the same was and is fraudulent, and should be set aside as null and void.

The bill also states on information and belief that the clerk of the circuit court [illegible] in which said alleged pretended judgment was entered, closed on or about August 1, 1934 before he had any knowledge of the rendition of such judgment; so that he was unable to take any steps by motion or otherwise to have said judgment set aside, or pray an appeal therefrom, or secure a bill of exceptions during said term, whereby his ordinary remedy at law was lost; that [illegible] was not at the time of the rendition of said judgment, nor has since been indebted to the [illegible] as set up in said pretended judgment, and [illegible] and claimed in the declaration in said case, but on the [illegible] or [illegible].

The bill [illegible] on prays that the alleged pretended execution and levy be set aside, and that the clerk [illegible] be restrained by order of court from advertising or selling the premises, or authorizing or causing the same to be done, or otherwise attempting to enforce said alleged pretended judgment in behalf of [illegible] and also prays for an order [illegible] the plaintiff [illegible] enjoining [illegible]

appellee, or either of them, from further levying said alleged pretended execution; and from otherwise enforcing, or attempting to enforce the same.

To this bill the appellee interposed a demurrer, which the court sustained, and thereupon entered an order dismissing the bill for want of equity, from which order appellant prosecutes this appeal.

It appears from the bill that the exhibit attached to the bill as the contract entered into between the parties was presumably only a part of the entire contract, and is the part signed by the appellee; but that evidently at the same time appellant signed another paper, which is not attached to the bill. Where two papers signed are a part of the same transaction one signed by one party to the contract, and the other by the other party to the contract, both papers constitute one contract and are to be considered as one instrument. No reason is given why a copy of the other part of the contract, which may have a note and power of attorney, and the instrument upon which the judgment was entered, is not attached to the bill. Moreover, the allegations in the bill in reference to signing such other instrument are inconsistent, for appellant alleges that if the paper contains his signature it is a forgery, but if the signature is genuine it was obtained by misrepresentation, fraud, false pretences and circumvention. There is no positive allegation that the signature is a forgery, nor that the signature was genuine, but obtained by fraud and misrepresentation. Nor are the facts stated upon which the claim of fraud and misrepresentation are based, and the allegations are clearly insufficient. While equity takes concur out

jurisdiction with law courts in matters of fraud accident or mistake, the facts constituting such fraud, accident or mistake, as a defense to the enforcement of a judgment, must be set out in the bill. (Lasher v Annuziata, 119 Ill. 655).

Moreover, to entitle a defendant in a judgment to relief against such judgment on the ground of fraud, accident or mistake, it must be evident not only that he had a defense upon the merits, but that such defense has been lost to him without such loss being attributable to his own omission, negligence or default. (Ward v Durham, 154 Ill. 195) Furthermore, it is apparent that appellee had a complete and adequate remedy at law. The allegations of the bill do not shaw any valid reason why appellant could not with reasonable diligence have filed a motion in the circuit court of Sangamon county, and upon a proper showing to the effect that his only knowledge of the entry of the judgment had come to him after the final ~~judgment~~ adjournment of the term at which the judgment was entered, have asked the court to open the judgment and give him leave to plead, and make the legal defenses which he claims to have to the entry of the judgment. A motion even to vacate a judgment filed at the next ensuing term after the confession of judgment is in apt time. (Kingman v Reinemer, 58 Ill.App. 174)

And if the matter simply involved an improper levy of an execution his remedy would have been by application to the court issuing the execution to quash the levy. (Palmer v Gardiner, 77 Ill. 143)

But the purpose of the injunction prayed for is to stay proceedings at law, and the statute requires that a bill having such a purpose in view should be brought in the county where the proceedings at law were had, which in this case is Sangamon

county. The circuit court of Kendall county, therefore, had no jurisdiction to entertain the bill, even though the bill had contained sufficient averments to give appellant a standing in a court of equity.

For the reasons stated we are of opinion that the demurrer was properly sustained, and that the court did not err in dismissing the bill.

Decree affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this
day of_____in the year of our Lord one thousand nine hundred and_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on APR 14 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6197.

August Cellarius, &c. appellant.

vs Appeal from Will.

Amanda Junker, appellee.

Niehaus, J.

In this case, a bill in equity was filed by August Cellarius, in his individual capacity, and as administrator of the estate of William Cellarius, against Amanda Junker, appellee to set aside a change of beneficiary made by the deceased, for the benefit of appellee, in two life insurance policies, and to enjoin the payment of the policies to appellee.

The bill alleges, that William Cellarius, the deceased had taken one life insurance policy in the National Life Association, of DesMoines, for $3,000 in which appellant, the brother of the deceased, had originally been named as beneficiary; and another policy had been taken out by the deceased, in the New York Life Insurance Company, for the sum of $1000 in which the mother of the deceased Mary Cellarius, had originally been named as beneficiary; that Mary Cellarius died about four years prior to the filing of the bill; and that by a change in the beneficiary, these policies had become payable to the appellee, and were in effect assigned to her, and that the deceased, in his request for the changes of beneficiary, had designated appellee as his "Fiancee".

The bill also charges, that the change in the beneficiary or assignments of the policies, were procured by the appellee through fraud and undue influence; also, that the deceased did not have, at the time of making the changes mentioned sufficient mental capacity for the transaction of ordinary business. The fraud charged, is that appellee pretended to

Cum. Ex. 1147.

Depuy Gilchrist, Jr. Appellant.

vs. A. Lord Ivon Will.

Hamilton County, Respondent.

Wickham, J.

In this case, filed in equity and tried by the court below, in his individual capacity, and as administrator of the estate of William Gallatin, against Amanda Lumpkin, it was held while a change of beneficiary made by the deceased, for the benefit of appellee, in two life insurance policies, and to enjoin the payment of the policies to appellee.

The bill alleges that William Gallatin, the deceased had taken one life insurance policy in the National Life Association, of Washington, for $5,000 in which appellant, the brother of the deceased, had originally been named as beneficiary, and another policy had been taken out by the deceased, in the New York Life Insurance Company, for the sum of $1000 in which the sister of the deceased Mary Gallatine, had originally been named as beneficiary; that they Gallatine had been four years prior to the filing of the bill, but had by a change in the beneficiary, these policies had been payable to the appellee, and were in effect assigned to her, and that the deceased, in his request for the change of beneficiary, had designated appellee as his "fiancee".

The bill also alleges that the change in the beneficiary was designedly of the policies, and procured by the appellee through fraud and undue influence; also, that the deceased did not have, at the time of making the change, sufficient mental capacity for the transaction of ordinary business. The first charge, is that appellee, prior to

be in love with the deceased at the time; and by misrepresentation and deceit in that regard, she unduly influenced the deceased, and by these methods caused him to make the changes.

Issues of fact were made up, and submitted to a jury and the jury returned a verdict, finding against the contention of appellant. The court sustained the findings of the jury; and entered a decree finding that appellee was the affianced wife of the deceased, and as beneficiary of the policies, was entitled to the proceeds thereof, which proceeds, by stipulation, had been paid into the hands of the master in chancery; and from this decree an appeal is prosecuted.

There was no question raised in the case as to the regularity of the change of beneficiary or assignment; it being stipulated by the parties, that the policies were duly assigned to the appellee in conformity with the rules and regulations of the respective insurance companies.

There is no evidence in the record to sustain the charges made in the bill, of fraud or undue influence; but there is evidence tending to show that the deceased, at the time of making the change of beneficiary, was mentally incompetent; a number of witnesses testified that the deceased, about the time he made the change, was incapacitated for the transaction of ordinary business; but there is a conflict in the evidence on that question. The deceased had had a stroke of apoplexy in December 1912, prior to making the change, which had confined him to the house and bed for several weeks; but thereafter he was up and around, and attended to some business; and in May 1913, he had another stroke, from the effects of which he died. The change of beneficiary was made on April 19th. and April 25th. respectively; that is to say, between

[illegible] the interest of the [illegible]; and by misrepresentation and deceit in that regard, she unduly influenced the deceased, and by those methods caused him to make the change.

Issues of fact were made up, and submitted to a jury; the jury returned a verdict, finding against the contention [illegible]. The court sustained the findings of the jury; [illegible] entered a judgment finding that [illegible] was the wife and of the deceased, and as beneficiary of the policies, [illegible] entitled to the proceeds thereof, [illegible] ~~policies, had been paid into the hands of the master in chancery, and from this judgment an appeal is prosecuted.~~

There is no question raised in the case as to the regularity of the change of beneficiary on assignment; it is conceded by the parties, that the policies were duly assigned in [illegible] in conformity with the rules and regulations of the respective insurance companies.

There is no evidence in the record to sustain the charges made in the bill, of fraud or undue influence; but there is evidence tending to show that the deceased, at the time of making the change of beneficiary, was mentally incompetent; a number of witnesses testified that the deceased, about the time he made the change, was incompetent for the transaction of ordinary business; but there is a conflict in the evidence on that question. The deceased had had a stroke of apoplexy in December 1918, prior to making the change, which had confined him to the house and bed for several weeks; but afterwards he was up and around, and attended to some business; and in May 1919, he had another stroke, from the effects of which he died. The change of beneficiary was made in June 1919, the fatal stroke, respectively, just a few days, between

the first stroke of apoplexy which the deceased suffered, and the second one, from which he died.

From the evidence showing mental capacity, it appears, that he made the arrangements for a change of beneficiary, after he had sufficiently recovered from the stroke to be up and around; he had resumed his habit of going to a certain store, where he would read the Chicago Tribune nearly every day, and could talk about things, about as well as usual, except that his speech was less distinct than before the stroke; that during this time, he went to another store, and bought articles, which he wished to use, and talked twenty or thirty minutes with the keeper of the store, and appeared to be rational and mentally competent; that he met people on the street, occasionally, and talked with them; from time to time, went to his physician's office for treatment. It also appears, that shortly before he was stricken the first time, he had collected several sums of money, due from members of a benevolent society of which he was an officer, but had not turned the money in to the Society, nor given the names of the members who had paid it; but after he had sufficiently recovered to walk about, he went to the proper officer, gave the names of the parties, and turned in the money. He also went to different places where he owed bills, and paid them.

"In a case of this character, where witnesses differ as to the mental capacity of the grantor and of his ability to legally transact business and to dispose of his property, the weight to be given to the testimony of the witnesses is much more readily to be determined by a [illegible] chancellor [illegible] a court of review, which reads only the written evidence. The law is well established in this state, that where a cause is heard by the chancellor, and the evidence is all, or partly, oral,

the first strokes of apoplexy which his successor suffered, the second one, from which he died.

From the evidence showing mental imbecility, it appears that he made the arrangement for a change of beneficiary, after he had sufficiently recovered from the stroke to be up and around; he had resumed his habit of going to a certain place, where he would read the Chicago Tribune every evening, and would talk about things, about as well as usual, except that his speech was less fluent than before the stroke; that during this time, he went to another store, and bought mirrors, which he wished to use, and talked freely minutes with the keeper of the store, and appeared to be rational and mentally competent; that he met people on the street, occasionally, and talked with them; from time to time, went to his physician's office for treatment. It also appears, that shortly before he was stricken the first time, he had collected several sums of money, due from him as of a benevolent society of which he was an officer, but had not turned the money in to the society, nor given the names of the members who had paid it; but after he had sufficiently recovered to talk sense, he went to the proper officers, gave the names of the parties, and turned in the money. He also went to different places where he owed bills, and paid them.

"In a case of this character, where witnesses differ as to the mental capacity of the testator at the time of his ability to transact business and to dispose of his property, the weight to be given to the testimony of the witnesses is much more readily to be determined by a jury, than by a court, on a review, which rests only on written evidence. The rule that established in this state, that where a court of law

it must appear that there is a clear and palpable error before a reversal will be had. In a case of this character, where the issue is tried by the chancellor before a jury, and where the verdict of the jury is only advisory and may be set aside by the chancellor, the rule should be just as strong that clear and palpable error should appear before the decree should be reversed." (Biggerstaff v Bihherstaff, 100 Ill. 407.)

"It has been wisely settled in chancery cases, that a court of review will not disturb the finding of fact of the chancellor, unless apparent error has been committed; and the rule thus announced applies with full force although the chancellor has submitted the case to a jury for an advisory verdict." (Dowie v Driscoll, 203 Ill. 480; Elmstedt v Nicholson, 186 Ill. 580.) It is not apparent from the record that any error was committed by the chancellor in sustaining the findings of fact in the verdict of the jury; and it is manifest, that while there is a conflict in the evidence upon the question of the mental capacity of the deceased, there is sufficient evidence to prove, that he was capable of transacting ordinary business at the time of the assignment of the policies.

Appellant also asserts that the evidence to show that the appellee was the fiancee of the deceased, is insufficient; but we are of opinion that the record discloses sufficient proof, that prior to the assignments of the insurance policies, the deceased had been engaged to be married to appellee, and that this engagement was the real motive for making the assignment of the insurance benefits to appellee.

~~It is also insisted that~~ The court ~~erred in~~ excluding evidence to show that ~~appellee~~ was playing cards, laughing and having a good time ~~in the home of Mrs. Fred Gellarius,~~ just

of [illegible], that there is a clear and probable cause for [illegible] may be had. In a case of this nature, [illegible] is made by the chancellor before [illegible] the verdict of the jury is only advisory.

[illegible] by the chancellor, the only ground is that [illegible] that clear and palpable error [illegible] before [illegible].

[illegible] has been widely adopted in chancery cases, that a court of review will not disturb the finding of fact of the chancellor, unless manifest error has been committed; [illegible] while the general application [illegible] has [illegible] submitted the case to a jury for an advisory verdict. [illegible]

Nicholson, 185 Ill. 610.) It is not apparent from the record that any error was committed by the chancellor in [illegible] the findings of fact in the verdict of the jury; and it is manifest, that while there is a conflict in the evidence upon the question of the mental capacity of the deceased, there is sufficient evidence to prove, that he was capable of transacting ordinary business at the time of the assignment in the pleadings.

Appellant also contends that the evidence in such that the appellee was the fiancee of the deceased, in fact a [illegible]; but we are of opinion that the record discloses sufficient proof, that prior to the assignments of the insurance policies, the deceased had been engaged to be married to appellee, and that this arrangement was the real motive for making the assignment of the insurance policies to appellee.

[illegible] evidence to show that [illegible] was playing cards, [illegible] having a good time in [illegible]

6214

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 101

BE IT REMEMBERED, that afterwards, to-wit: on APR 14 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8814.

William Rako, appellee.

vs Appeal from Kane.

E. J. & E. Ry. Co. appellant.

Niehaus, J.

This is an appeal in a case commenced by the appellee William Rako. in the Circuit Court of Kane County, against the appellant Elgin, Joliet & Eastern Railway Company, and G. Holland, to recover damages sustained by appellee, because of the death and sickness of some of his cows, which was caused as the result of certain negligence charged in appellee's declaration.

The declaration consists of an original and an additional count, in both of which it is alleged that the appellee, and one G. Holland, who was also a defendant in the trial court were in possession of adjoining properties, which were separated by a division fence; that these properties joined to the right of way of the appellant Railway Company. That it was the duty of the defendant Holland, to maintain the division fence between the properties, in proper condition, and that notwithstanding such duty, he permitted said fence to become out of repair, and continue out of repair, until it became decayed and fell down; and that the defendant Railway Company negligently injured and damaged said division fence, and wrongfully removed said division fence, or parts thereof; that in consequence thereof, the cattel of said plaintiff got into the close of the defendant Holland, and there consumed the green corn growing therein, whereby they were injured.

To each of the counts in the declaration, the appellant and Holland pleaded the general issue, and a special plea, upon which issues the case was tried.

Sum. Ex. 2111.

William Cook, Appellant.

vs.

[illegible] Lumber Company.

T. J. L. T. Ry. Co. Appellee.

Filed [illegible], 1.

This is an appeal in a case determined by the appellee William Hako. In the Circuit Court of Tree County, against the appellant Elgin, Joliet & Eastern Railway Company, and E. Holland, to recover damages sustained by appellee, because of the acts and omissions of each of the [illegible], which [illegible] caused by the result of certain negligence charged in appellee's complaint.

The declaration consists of one [illegible] count, in both of which it is alleged that the [illegible] and E. Holland, [illegible] in possession of adjoining properties, which were separated by a division fence; that these properties joined in the right of way of the appellant Railway Company. [illegible] the duty of the defendant Holland, to maintain the division fence between the properties, in proper condition, and [illegible] notwithstanding such duty, he permitted said fence to become out of repair, and continued out of repair, until it became [illegible] and that the defendant Railway Company negligently injured and damaged said division fence, and wrongfully removed said division fence, or parts thereof, and in consequence thereof, the stock of said [illegible] got into the close of the defendant Holland, and there consumed the grass and growing [illegible].

To each of the counts in the declaration, the appellant and Railway filed the general issue, and a special plea, [illegible]

At the close of the evidence for the appellee, the appellant made a motion to direct a verdict filding the appllant not guilty, which motion was overruled; and the appellant, at the close of all the evidence in the case, renewed the motion to direct a verdict of not guilty, which was again overruled by the court. A verdict was thereafter returned by the jury, finding the appellant guilty, and assessing plaintiff's damages at the sum of $400; and finding the defendant G. Holland, not guilty. A motion for a new trial, and in arrest of judgment were made by the appellant, and overruled by the court; and a judgment thereupon entered for $400. against the appellant from which judgment the appeal is taken.

The proof shows, that the appellee was a dairy farmer and owned a number of cows; that these cows had been turned into a field which adjoined a corn field owned by Holland; that the corn field was separated from appellee's premises, by a division fence. This division fence was made by posts set in the ground, and wires strung along, and fastened to the posts; and it was built up closely to the line of appellant's right of way, but did not join onto the right of way fence.

The evidence tends to show, that the division fence, at the time the cows got into the Holland corn field, was partly broken down; and that one or two of the posts holding the wires, had been pulled upand thrown down, with the wires attached, on the land of the appellee, which made a sufficient opening for the cows to get into the Holland field; and that while in there, the cows over-fed on the green corn; that in consequence, two of the cows died, and a number of them became sick, and were injured to such extent as to become less valuable. But the record does not disclose any evidence tending to prove that appellant was guilty of the negligence charged in the declaration.

At the close of the evidence for the appellee, the defendant made a motion to direct a verdict finding the appellant not guilty, which motion was overruled; and the appellant, at the close of all the evidence in the case, renewed the motion to direct a verdict of not guilty, which was again overruled by the court. A verdict was thereafter returned by the jury, finding the appellant guilty, and assessing plaintiff's damages at the sum of $400; and finding the defendant C. Holland, not guilty. A motion for a new trial, and to arrest of judgment [illegible] judgment thereupon entered for $400. against the appellant [illegible] which judgment the appeal is taken.

[illegible] was a dairy farmer [illegible] owned a number of cows; that these cows had been turned [illegible] to a field which adjoined a corn field owned by Holland; that the corn field was separated from appellee's premises, by a [illegible]. The dilapidated fence was only by posts and in the ground, and wire strung along, and fastened to the posts; and it was built up closely to the line of [illegible] right of way, but did not join onto the right of way fence.

The evidence tends to show, that the trespass done, at the time the cows got into the Holland corn field, was partly eaten down; and that one or two of the posts holding the wires, had been pulled down down, with the wires [illegible], on the land of the appellee, which made a sufficient opening for the cows to get into the Holland field; and that while in there, the cows over-fed on the green corn; that in consequence, two of the cows died, and a number of them became sick, and were injured to such extent as to become less valuable. But the record does not disclose any evidence tending to prove, that [illegible] the cows [illegible] the

The only evidence which connected the appellant with the matter ~~at all~~, is to the effect, that about 3 weeks prior to the time when the cows became sick, some of appellant's fence builders had worked on the right of way fence, at the place in question; and had substituted woven wire for the barbed wire on the right of way fence; but there is nothing in the evidence to justify the inference that this work by the employes of the appellant, could have had the effect, even if it were negligently performed, to in any manner interfere with or disturb, or break down the division fence, which was entirely disconnected from the right of way fence; nor could it possibly have had the effect of pulling out any of the posts of the division fence. And the positive evidence all goes to show, that the employes did not in any way cause any of the posts of the division fence to be pulled out, nor cause any of the posts to fall down or break down; or to be interfered with, or disturbed in any manner.

Under these circumstances there can be no recovery against the appellants; and the judgment therefore is reversed.

Judgment reversed.

Finding of Facts to be incorporated in the Judgment.

We find from the evidence that the appellant was not guilty of the negligence charged in the declaration.

the matter at all, as to the effect, that about 3 weeks prior to the time when the cows broke out, some of respondent's fence builders had worked on the right of way fence, at the place in question; and had substituted woven wire for the barbed wire on the right of way fence; but there is nothing in the evidence to justify the inference that this work by the employes of the respondent, could have had the effect, even if it were negligently performed, to in any manner interfere with or disturb, or break down the division fence, which was entirely disconnected from the right of way fence; nor could it possibly have had the effect of pulling out any of the posts of the division fence. And the positive evidence all goes to show, that the employes did not in any way cause any of the posts of the division fence to be pulled out, nor cause any of the posts to fall down or break down; or to be interfered with, or disturbed in any manner.

Under these circumstances there can be no recovery against the appellants; and the judgment thereofore is reversed.

Finding of facts to be incorporated in the judgment.

We find from the evidence that the appellant has not failed of the negligence charged in the declaration.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

0042

247

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 102

BE IT REMEMBERED, that afterwards, to-wit: on APR 14 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. Np. 6043.

William Fleming, et al

appellees.

vs Appeal from Will.

E. J. & E. Ry. Co.

appellant.

PER CURIAM:

One of the Judges of this court tried this cause in the court below; and the other two judges are divided in opinion upon the question whether the judgment should be affirmed or reversed; the judgment is therefore affirmed by operation of law.

Binder v Langhorst, 139 Ill. App. 493.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____.

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on APR 26 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6168

Edward B. Kreis, appellant

vs Appeal from Rock Island.

The County of Rock Island. et al

appellees.

Dibell, P. J.

Edward B. Kreis, a citizen, real estate owner and tax payer of the city of Rock Island, filed a bill in equity against the County of Rock Island, its supervisors and its jail building committee, to enjoin the county from building a new jail on the west side of the public square, and gave notice to defendants of an application for a temporary injunction. Defendants appeared and filed affidavits denying many of the allegations of the bill. Complainant moved for a rule on defendants to plead, answer or demur before the motion for an injunction was heard, and also moved to strike the affidavits filed by defendants from the files. Each motion was denied; the court heard the motion for an injunction upon the bill and affidavits and denied the motion and dismissed the bill. The affidavits and exhibits thereto were preserved by a certificate of evidence. Complainant appeals from that decree.

Dunne, Catholic Bishop, vs The County of Rock Island, in which the supreme court filed an opinion on April 20, 1916 was a simiar bill for the same relief, and the record in this case shows that the motion for an injunction in the Dunne case was set for the same day as the motion in this case. In that case the court denied motions to compel the defendants to plead and to strike affidavits filed by the defendants from the files, and dismissed the bill. In that case the affidavits were contradictory to the bill, and it

Sen. 19. 1924

Edward E. Neale, plaintiff

vs Appeal from Rock Island.

The County of Rock Island, et al

defendants.

Gibson, J. d.

Edward E. Neale, a citizen, real estate owner and tax payer of the city of Rock Island, files a bill in equity against the County of Rock Island, its supervisors and its jail building committee, to enjoin the county from erecting a new jail on the west side of the public square, and prays notice to defendants of an application for a temporary injunction. Defendants appeared and filed affidavits denying many of the allegations of the bill. Complainant moved for a rule on defendants to plead, answer or demur before the motion for an injunction was heard, and also moved to strike the affidavits filed by defendants from the files. Both motion was denied; the court heard the motion for an injunction upon the bill and affidavits and denied the motion and dismissed the bill. The affidavits and exhibits therewith were preserved by a certificate of evidence. Complainant appealed.

Prior, October Term, 1923, of the Supreme Court in which the supreme court filed an opinion on April 10, 1924 was a similar bill for the same relief, and the record in this case shows that the motion for an injunction in the former case was set for the same day as the motion in this case. In that case the court denied motions to compel the defendants to plead and to strike affidavits filed by the defendants from the files, and dismissed the bill. In that case the affidavits were substantially as in this bill, and in

was held that they could not be received for that purpose till the bill had been answered. For the reasons stated by the supreme court in that opinion the court below erred in this case in refusing to rule the defendants to plead and in refusing to strike from the files the affidavits filed by defendants. It was therefore held that upon the denial of the injunction, the court should not dismiss such a bill before any pleading by defendants, unless it appeared from the bill that it could not be so amended as to state a case in equity. In this case, leaving out of consideration all other allegations of the bill upon which the prayer for relief is based, this bill charged that the County of Rock Island was indebted beyond the constitutional limit and that the cost of the new jail and other matters intended to be built in connection therewith would be so great that, even with the avails of the bond issue which the people had voted, still the indebtedness to be created by said work would be beyond the constitutional authority of the County to create. These allegations, if true, would justify the relief. It may be they are too general and should set out the amount of the County's indebtedness, the assessed value of its taxable property, and should show in greater detail that the building of the new jail would involve the County in an unconstitutional debt; but if it was too general, it could be amended, and the allegations were sufficient in that respect unless questioned by demurrer. It was therefore error to dismiss the bill. The decree is therefore reversed and the cause is remanded.

Reversed and remanded.

was held that they could not be received for that purpose until the bill had been conveyed. For the reasons stated by the supreme court in that opinion the court below erred in this case in refusing to rule the defendants to plead and in refusing to strike from the files the defendants' plea by defendants. It was therefore held that upon the trial of the injunction, the court should not dismiss such a bill before any pleading by defendants, unless it appears from the bill that it could not be so amended as to show a case in equity. In this case, leaving out of consideration the alleged allegations of the bill upon which the prayer for relief is based, the bill charged that the County of Rock Island was indebted beyond the constitutional limit and that the cost of the new jail and other active interests to be built in connection therewith would be so great that, even with the avails of the bond issue which the people had voted, still the indebtedness to be created by this work would go beyond the constitutional authority of the County to create. These allegations, if true, would justify the relief. It may be they are too general and should set out the amount of the County's indebtedness, the assessed value of its taxable property, and should show in greater detail that the building of the new jail would involve the County in an unconstitutional debt; but if it was too general, it could be demurred, but the allegations were sufficient in that respect unless questioned by demurrer. It was therefore error to dismiss the bill.

The decree is therefore reversed and the cause is remanded.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6210

1852

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 424

BE IT REMEMBERED, that afterwards, to-wit: on APR 26 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6310.

George J. Burkheimer,

Deft. in error.

vs Error to Peoria.

C. R. I. & P. Ry. Co.

Pltf in error.

Carnes, J.

George J. Burkheimer, plaintiff below (defendant in error here) was, on November 23, 1911, acting as a motorman for the Peoria Railway Company, and after ten o'clock at night while he was running one of its cars over a crossing at grade of the Chicago, Rock Island & Pacific Railway Company defendant below (plaintiff in error here) an engine of the defendant running at a high rate of speed and in violation of a city ordinance, collided with the plaintiff's car in flicting on him serious bodily injury, for which he brought this action, and after successive trials had verdict and judgment for $3000 from which judgment this writ of error is prosecuted. The verdict is small considering the seriousness of the injury. There was no question that the defendant was guilty of negligence in running its trains in violation of the city ordinance which limited the speed to six miles per hour. The evidence fairly shows that it was running at a much higher rate of speed. It is not claimed that any error occurred in admitting or rejecting evidence, or giving or refusing instructions except in refusing to direct a verdict for the defendant. A reversal is sought here solely on the ground that the plaintiff was not in the exercise of due care for his own safety at and immediately prior to the time of the injury. It is admitted if he was in the exercise of care he can recover and said if he was not in the exercise of due care it makes no dif-

Gen. No. 8810.

George J. Burkheimer,

Deft. in error.

vs. Error to Peoria.

C. R. I. & P. Ry. Co.

Plff. in error.

Carnes, J.

George J. Burkheimer, plaintiff below (defendant in error here), was, on November 25, 1911, acting as a motorman for the Peoria Railway Company, and after ten o'clock at night while he was running one of its cars over a crossing at grade of the Chicago, Rock Island & Pacific Railway Company defendant below (plaintiff in error here) an engine of the defendant running at a high rate of speed and in violation of a city ordinance, collided with the plaintiff's car in inflicting on him serious bodily injury, for which he brought this action, and after successive trials had verdict and judgment for $8000 from which judgment this writ of error is prosecuted. The verdict is small considering the serious-ness of the injury. There was no question that the defendant was guilty of negligence in running its train in violation of the city ordinance which limited the speed to six miles per hour. The evidence fairly shows that it was running at a much higher rate of speed. It is not claimed that any error occurred in admitting or rejecting evidence, or giving or refusing instructions except in refusing to direct a verdict for the defendant. A reversal is sought here solely on the ground that the plaintiff was not in the exercise of due care for his own safety at and immediately prior to the time of the injury. It is admitted if he was in the exercise of care he can recover and said

ference whether the defendant was guilty of negligence or not. We are asked by both parties not to remand the cause. The record does not show the number or result of preceding trials; but appellant apparently prefers that we affirm the judgment rather than reverse and remand the case for another trial. We have therefore examined the evidence with a view of determining whether the trial court would have been justified in directing a verdict for the defendant, and, if not, whether we are warranted in reversing the case with a finding of fact that the plaintiff was guilty of contributory negligence.

The plaintiff had worked for the Peoria Railway Company as motorman for about three weeks and had no previous street car experience. His instructions from his employer, which he understood and before the time of the accident obeyed, were to bring his car to a stop before crossing the defendant's road and wait for his conductor to proceed on to the defendant's track and signal him to cross over. His theory of the case is that he was intending to go stop his car at the time in question but that it was dark and snowing and he was relying on an electric light that the defendant maintained over the crossing to guide him as to the place to stop; that at the time the light was not burning and he, misled thereby, drove on to the crossing without knowing where he was. The evidence is conflicting on the question whether it was snowing, and it shows, or tends to show that there were other means from which the plaintiff might have known that he was approaching the track. From a reading of the record we are inclined to the opinion that ordinary prudence would have guarded the plaintiff against the accident and injury. But it was a question for the jury,

fences whether the defendant was guilty of negligence or not. We are asked by both parties not to remand the cause. The record does not show the manner or result of proceeding trials; but respondent apparently prefers that we affirm the judgment rather than reverse and remand the case for another trial. We have therefore examined the evidence with a view of determining whether the trial court would have been justified in directing a verdict for the defendant, and, if not, whether we are warranted in reversing the case with a finding of fact that the plaintiff was guilty of contributory negligence.

The plaintiff had worked for the Peoria Railway Company as motorman for about three weeks and had no previous driver's experience. [illegible] observed, were to bring his car to a stop before crossing the defendant's road [illegible] to the defendant's road. His theory of the case is that he was intending to stop his car at the time in question but that it was dark and snowing and he was relying on an electric light that the defendant maintained over the crossing to guide him as to when plans to stop; that at the time the light was not burning and he, misled thereby, drove on to the crossing without knowing where he was. The evidence is conflicting on this question whether it was snowing, and it shows, it tends to show that there were other rooms from which the plaintiff might have known that he was approaching the track. [illegible] of the record we are inclined to the opinion that ordinary prudence would have guarded the plaintiff against the accident and injury. For it was a question for the jury,

and the trial court could not have directed a verdict without weighing conflicting evidence, which he is not permitted to do. And while we are not satisfied with the verdict, and were this the first trial might regard it our duty to reverse and remand the case on the ground that in our opinion the verdict is against the weight of the evidence on the question of the plaintiff's care, ~~xxxxx~~ still we do not regard the evidence so clear and satisfactory on that point as to warrant us in determining the issues here by reversing the judgment without remanding the case. Plaintiff's duty to stop his car before reaching the crossing was one that he owed to his employer and not, so far as this record shows, to the defendant. Whether he was in the exercise of ordinary care in ~~xxxxxx~~ guiding himself as to the place to stop and made a mistake that an ordinarily prudent man might make under the circumstances, is not free from doubt. There is room for a reasonable difference of opinion on that subject. Therefore the judgment is affirmed.

Affirmed.

Niehaus, P. J. took no part.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on APR 26 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6171

C. V. O'Connor, appellee

vs Appeal from Boone.

P. R. Kennedy, appellant.

Niehaus, J.

This is a suit brought in the circuit court of Boone County by the appellee, C. V. O'Connor, a merchant doing business in Belvidere, against the appellant, P. R. Kennedy who was the owner of a farm near Belvidere, to recover commissions for services which the appellee claims he rendered under an agreement with appellant to procure a purchaser for appellant's farm, and for services rendered in connection with the sale of the farm to Theodore Schwebke, the purchaser.

The declaration contains the common counts, and a special count alleging, that appellant agreed with appellee, to pay him a usual and customary commission of two per cent on the saleprice of appellant's farm, for procuring a purchaser for the farm and that appellee did procure such purchaser, namely Theodore Schwebke, who bought the farm for $33,000.

It appears from the evidence that the appellant, who is now a resident of Los Angeles, California, previously resided in Boone County; he owned the famm in question, consisting of about 317 acres, which was situated in the Township of Belvidere; that prior to his removal to California he tried to sell this farm; and so in March 1912, offered it to Theodore Schwebke; but Schwebke said, he was not so situated as to be able to buy the farm,at that time. Afterwards in the month of July, of the same year, Schwebke went to the clothing store of the appellee, and inquired if he knew where appellant was then living; that he wanted to ascertain the price for which the farm could be purchased.

Civ. No. 6171

C. V. O'Connor, appellee,

vs. Appeal from Boone.

P. R. Kennedy, appellant.

Wickham, J.

This is a suit brought in the circuit court of Boone County by the appellee, C. V. O'Connor, a merchant doing business in Belvidere, against the appellant, P. R. Kennedy who was the owner of a farm near Belvidere, to recover commissions for services which the appellee claims he rendered under an agreement with appellant to procure a purchaser for appellant's farm, and for services rendered in connection with the sale of the farm to Theodore Schwebke, the purchaser.

The declaration contains the common counts, and a special count alleging, that appellant agreed with appellee, to pay him a usual and customary commission of two per cent on the selling price of appellant's farm, for procuring a purchaser for the farm and that appellee did procure such purchaser, namely Theodore Schwebke, who bought the farm for $33,000.

It appears from the evidence that the appellant, who is now a resident of Los Angeles, California, previously resided in Boone County; he owned the farm in question, consisting of about 317 acres, which was situated in the Township of Belvidere; that prior to his removal to California he tried to sell this farm; and so in March 1912, offered it to Theodore Schwebke; but Schwebke said, he was not so situated as to be able to buy the farm at that time. Afterwards in the month of July, of the same year, Schwebke went to the clothing store of the appellee, and inquired if he knew where appellant was then living; that he wanted to ascertain the price for which the farm could be purchased,

The appellee thereupon volunteered to write to appellant to obtain the desired information, and did so. He wrote, inquiring what was the lowest price at which appellant would sell his farm; at the same time informing him, that he had a purchaser for the farm,but did not disclose the name of the purchaser.

Appellant answered appellees letter, saying that he would sell the farm for $140 per acre; and added a postscript which was to the effect that he would pay appellee a commission, in case he succeeded in making a sale of the farm to the purchaser in question. Afterwards, Schwebke came to appellees store, before he had received appellant's answer to the letter, and inquired whether appellee had heard from appellant concerning the price of the farm; and appellee told Schwebke, that he had not then heard; but that as quick as he had heard, he would let him know. Afterwards, Schwebke came in again, and appellee then informed him that the price of the farm, according to the letter he had received from appellant, was $140 an acre; and Schwebke said, that was all he wanted to know.

Nothing further was done, with reference to the matter, until the month of September following, when appellant came to Belvidere on a visit, and went to see appellee. Appellee then informed him, that the purchaser he had in view was Schwebke. Thereupon appellant and appellee together went to see Schwebke, at his home; and appellant talked with Schwebke about the sale of the farm to him; and the next day, hired an automobile, and took Schwebke out to the place to look it over. Schwebke was willing to purchase the farm , but wanted to turn in on the purchase price, a $20,000 mortgage which he held; and appellant would not accept this mortgage as a part of the purchase price, unless Schwebke would agree

The appellee thereupon volunteered to write to appellant to obtain the desired information, and did so. He wrote, inquiring what was the lowest price at which appellant would sell his farm; at the same time informing him, that he had a purchaser for the farm, but did not disclose the name of the purchaser.

Appellant answered appellees letter, saying that he would sell the farm for [illegible] and added a postscript with one to the effect that he would [illegible] allege a commission, in case he succeeded in [illegible] sale of the farm to the purchaser in question. Afterwards, Sohwebke came to appellees store, before he had received appellant's answer to the letter, and inquired whether appellee had heard from appellant concerning the price of the farm; and appellee told Sohwebke, that he had not then heard; but that as quickly as he had heard, he would let him know. Afterwards, Sohwebke came in again, and appellee then informed him that the price of the farm, according to the letter as had received from appellant, was $110 an acre; and Sohwebke said, that was all he wanted to know.

Nothing further was done, with [illegible] matter, until the month of September following, when appellant came to Belvidere on a visit, and went to see appellee. Appellee then informed him, that the purchaser he had in view was Sohwebke. Thereupon appellant and appellee together went to see Sohwebke, at his home; and appellant talked with Sohwebke about the sale of the farm to him; and the next day, hired an automobile, and took Sohwebke out to the place to look it over. Sohwebke was willing to purchase the farm, but wanted to turn in on the purchase price, a $30,000 mortgage which he held; and appellant would not accept this mortgage

to give him a discount of $1,000. The parties disagreed about this matter, and negotiations were ended, and the deal declared off, about September 9th. 1913. Appellant and Schwebke do not appear to have had any further negotiations until the final negotiations, about the middle of the following October; and those negotiations resulted in the sale of the farm to Schwebke.

It is claimed by appellee, that notwithstanding the breaking off of the negotiations in September, he kept on in his efforts to induce Schwebke to purchase the famm; that after the first negotiations had been broken off, Schwebke declared, that he would have nothing further to do with appellant, concerning the purchase of the farm, because appellant had not treated him properly in the matter; but that a pellee, by repeated efforts, finally induced him, to again consider the purchase.

After the negotiations had been broken off, appellant leased the farm to a tenant and made several improvements on the farm. He built new fences, and a barn, on the place, at an expense of about $1500. Appellee claims, that while these im rovements were in progress, he a ain spoke to appellant, in his store, about the sale of the farm; and again broached the subject of its purchase by Schwebke. He also claims that he told appellant, he could not see why appellant was ignoring him in"the farm deal;" that appellant was offering other agents two per cent for selling the farm, and none of them were able to get a buyer; that he, appellee could sell the farm to Schwebke, if anybody in Boone County could; and that appellant answered, by promising appellee that if he got Schwebke to buy the farm, he would give him the same commission he would pay anybody else; and that appellants also stated, he would sell the farm to Schwebke

to give him a discount of $1,000. The parties disagreed about this matter, and negotiations were ended, and the deal declared off, about September 8th. 1912. Appellant and Schwebke do not appear to have had any further negotiations until the final negotiations, about the middle of the following October; and those negotiations resulted in the sale of the farm to Schwebke.

It is claimed by appellee, that notwithstanding the breaking off of the negotiations in September, he kept on in his efforts to induce Schwebke to purchase the farm; that after the first negotiations had been broken off, Schwebke declared, that he would have nothing further to do with appellant, concerning the purchase of the farm, because appellant had not treated him properly in the matter; but that appellee, by repeated efforts, finally induced him, to again consider the purchase.

After the negotiations had been broken off, appellant leased the farm to a tenant and made several improvements on the farm. He built new fence, and a barn, on the place, at an expense of about $1500. Appellee claims, that while these improvements were in progress, he again spoke to appellant, in his store, about the sale of the farm; and again proposed the subject of its purchase by Schwebke. He also claims that he told appellant, he could not see why appellant was ignoring him in"the farm deal;" that appellant was offering other agents two per cent for selling the farm, and none of them were able to get a buyer; that he, appellee could sell the farm to Schwebke, if anybody in Boone County could; and that appellant answered, by promising appellee that if he got Schwebke to buy the farm, he would give him the same commission he would pay anybody else; and that

if Schwebke would pay for the improvements he had made, in addition to the price he wanted, per acre, which was either $140 or $150. Appellee claims, that he then took up the matter with Schwebke, upon the new terms, and Schwebke finally said, he would again consider the purchase of the farm; and that thereupon, appellee informed appellant, that Schwebke was ready to buy the farm, if he would see him; and that appellant replied, that he could not see him that day, but would in a day or two; and afterwards, within a day or two, that appellant did see Schwebke, and entered into the negotiations for the sale of the farm to him, which finally resulted in an agreement, and sale.

Appellant does not deny, that he had the conversation referred to, with appellee, at his store, concerning the terms upon which he would sell the farm; but denies, that he promised to pay appellee a commission, at that time. There is other evidence in the case, aside from the testimony of the parties in interest, some of which tends to corroborate and some of which tends to contradict the testimony which they gave respectively concerning the matters in controversy. A jury trial resulted in a verdict for appellee; and finding the amount due him to be $608; whereupon appellant made a motion for a new trial, which was overruled, and a judgment entered on the verdict; from which judgment this appeal is prosecuted. This is the second appeal in this case; the first appeal having resulted in reversal, and a remanding of the cause for another trial. (O'Connor v Kennedy, 186 Ill. App. 277).

It is insisted by appellant, that appellee had no right to recover commissions, because thereis evidence to show, that the purchaser was not really procured by appellee; that the purchaser had first been spoken to about the matter

if Schwobke would pay for the improvements he had made, in addition to the price he wanted, per acre, which was either $110 or $120. Appellee claims, that he then took up the matter with Schwobke, upon the new terms, and Schwobke finally said, he would again consider the purchase of the farm; and that thereupon, appellee informed appellant, that Schwobke was ready to buy the farm, if he would see him; and that appellant replied, that he could not see him that day, but could in a day or two; and afterwards, within a day or two, that appellant did see Schwobke, and entered into negotiations for the sale of the farm to him, which finally resulted in a contract, as said.

Appellant was not duty, that he had his conversations referred to, with appellee, at his store, concerning the terms upon which he would sell the farm; but denies, that he authorized to pay appellee a commission, at that time. There is other evidence in the case, aside from the testimony of the parties in interest, some of which tends to contradict the testimony which has some of which tends to contradict the testimony which they have respectively concerning the claims in controversy. A jury trial resulted in a verdict for appellee; and finding the amount due him to be $608; whereupon appellant made a motion for a new trial, which was overruled, and a judgment entered on the verdict; from which judgment this appeal is prosecuted. This is the second appeal in this case; the first appeal having resulted in reversal, and a remanding of the cause for another trial. (O'Donner v Kennedy, 158 Ill. App. 171).

It is contended, that appellee failed to make out a case, because appellee claims, because appellant's testimony, that the purchaser was not really represented by appellee;

of the sale, by the appellant himself before appellee had talked with him about the matter; and that appellant therefore was really the first one to interest the purchaser in the purchase of the farm, and therefore that a recovery cannot be had, under the allegations of the special count; that the first negotiations which were consequent on the promise of appellant to pay appellee a commission, had been entirely broken off and ended; and that the second negotiations, in October 1912, were an entirely independent matter, in no way connected with the previous negotiations; and the sale which followed these negotiations, was in no way connected with any efforts of appellee; that the evidence does not sustain a recovery under the special count; and that appellee, therefore, has no right to recover at all.

We are of opinion, that if, after the first negotiations concerning the purchase of this farm by Schwebke, had been declared off, appellant agreed to pay to appellee, a commission as testified to by him; and that upon the basis of this later agreement, appellee made efforts to induce Schwebke to purchase the farm, which efforts had the effect of bringing Schwebke and appellant to an understanding and agreement concerning the sale, a recovery can be sustained under the common counts. (Peter Boxberger v Edward Scott, 38 Ill. 477.) As to whether appellant did agree to pay commissions to appellee, as stated; and whether or not appellee did actually make the efforts which he testified to; and whether such efforts were instrumental in bringing about the purchase of the farm by Schwebke, were questions of fact to be determined by the jury. There is sufficient evidence in the record to justify a jury in finding for appellee upon these questions; and this Court, is therefore not in position to say, that the finding was not in accordance with the evidence

of the sale, by the appellant himself before appellee had talked with him about the matter; and that appellant therefore was really the first one to interest the purchaser in the purchase of the farm, and therefore that a recovery cannot be had, under the allegations of the special count; that the first negotiations which were consequent on the promise of appellant to pay appellee a commission, had been entirely broken off and ended; and that the second negotiations, in October 1913, were an entirely independent matter, in no way connected with the previous negotiations; and the sale which followed these negotiations, was in no way connected with any efforts of appellee; that the evidence does not sustain a recovery under the special count; and that appellee, therefore, has no right to recover at all.

We are of opinion, that if, after the first negotiations concerning the purchase of this farm by Schwebke, had been declared off, appellant agreed to pay to appellee, a commission as testified to by him; and that upon the basis of this later agreement, appellee made efforts to induce Schwebke to purchase the farm, which efforts had the effect of bringing Schwebke and appellant to an understanding and agreement concerning the sale, a recovery can be sustained under the common counts. (Peter Boxberger v Edward Scott, 32 Ill. 477.)

As to whether appellant did agree to pay commissions to appellee, as stated; and whether or not appellee did actually make the efforts which he testified to; and whether such efforts were instrumental in bringing about the purchase of the farm by Schwebke, were questions of fact to be determined by the jury. There is sufficient evidence in the record to justify a jury in finding for appellee upon these questions; and this Court, is therefore not in position to say that the finding was not in accordance with the evidence

especially since two juries found for appellee on practically the same evidence.

Appellant complains, that the trial court erred in refusing to permit him to cross examine appellee as to the detailsof his knowledge of the farm in question; as to how many acres there were on one side of the railway; and how many acres there were on a certain side of the highway &c. Inasmuch as appellee had not testified, that he had any special knowledge of the farm, or its situation; and inasmuch as Schwebke appears to have been perfectly familiar with the land, it is not apparent why a detailed knowledge ofthe land by appellee, was necessary to bring about a sale to Schwebke. We are of opinion that the Court did not err in refusing to permit any extended cross examination concerning these matters which had not been the subject of an examination in chief, and which do not appear to be material, in the determination of the important question of the controversy.

Appellant also complains of the refusal of several instructions requested by him. The instructions which were refused, made it essential for recovery by appellee, that the purchaser was originally procured by appellee. In view of the fact, that there is evidence to the effect that after the first negotiations were declared off, appellant told appellee he would pay him commissions, if he would bring about the purchase of the farm by Schwebke, these instructions contained an element which might have misled the jury; they might have inefrred that appellee was not entitled to recover, even though they believed that the second offer to pay commissions was made, if the purchaser was one whom appellant had originallt talked to, concerning the purchase of the land.

especially since two juries found for appellee on practically the same evidence.

Appellant complains, that the trial court erred in refusing to permit him to cross examine appellee as to the extent of his knowledge of the farm in question; as to how many acres there were on one side of the railway; and how many acres there were on a certain side of the highway. Inasmuch as appellee had not testified, that he had any special knowledge of the farm, or its size; and inasmuch as Cowsbie appears to have been perfectly familiar with the land, it is not apparent why a detailed knowledge of the land by appellee, was necessary to bring about a sale to Cowsbie. We are of opinion that the Court did not err in refusing to permit any extended cross examination concerning these matters which had not been the subject of an examination in chief, and which do not appear to be material, in the determination of the important question of the veracity.

Appellant also complains of the refusal of several instructions requested by him. The instructions which were refused, make it essential for recovery by appellee, that the purchaser was originally procured by appellee. In view of the fact, that there is evidence to the effect that after the first negotiations were declared off, appellant told appellee he would pay him commissions, if he would bring about the purchase of the farm by Cowsbie, these instructions contained an element which might have misled the jury; that might have inferred that appellee was not entitled to recover, even though they believed that the second offer to pay commissions was made, if the purchaser was one whom appellant had originally talked to, concerning the purchase of the land.

The instructions were therefore properly refused.

Appellant also makes objection on account of the misspelling of the word "effect" in an instruction the letter "a" being substituted for the letter "e" in the word. We are of opinion that the jury could not have been misled by this slight error in spelling; and that they undoubtedly gathered the significance of the point presented in the instruction, notwithstanding the error.

Objection is also made by appellant, because several instructions for appellee, told the jury that the appellee "is entitled to recover, if he was instrumental in bringing the buyer and seller together"; and insists, that this authorized the jury to find for appellee, from the mere fact of a physical bringing together of the parties mentioned. This was not the purpose or meaning of the instruction; and we have no reason to think that the jury inferred a different meaning from that usually inferred from the use of language of the kind in connection with similar matters; namely, bringing the parties together, to an understanding, upon a matter of purchase and sale; and this was the question involved in the case, the only kind of bringing together that there was any contest about in the case. Instructions containing similar language, in controversies of this nature, have been repeatedly sustained by the Courts of Review in this State. (Henry v Stewart, 85 Ill. App. 170; affirmed in 186 Ill. 448; Haffner v Herron, 60 Ill. App. 593; affirmed in 165 Ill. 242.)

Other objections were made by appellant, to instructions on the ground that facts necessary to a recovery are assumed in them; and that some of them assume that appellee is entitled to recover a commission; and that some of them are erroneous and argumentative because of the repetition of the ~~xxxxxxx~~

The instructions were therefore properly refused.

Appellant also makes objection on account of the misspelling of the word "effect" in an instruction the letter "c" being substituted for the latter "s" in the word. We are of opinion that the jury would not have been misled by this slight error in spelling; and that they understandingly gathered the significance of the point presented in the instruction, notwithstanding the error.

Objection is also made by appellant, because several instructions for appellee, told the jury that the vendee "is entitled to recover, if he was instrumental in bringing the buyer and seller together"; and insists, that this authorized the jury to find for appellee, from the mere fact of a physical bringing together of the parties mentioned. This was not the purpose or meaning of the instruction; and we have no reason to think that the jury inferred a different meaning from that usually inferred from the use of language of the kind in connection with similar matters; namely, bringing the parties together, to an understanding, upon a matter of purchase and sale; and this was the question involved in the case, the only kind of bringing together that there was any contest about in the case. Instructions containing similar language, in controversies of this nature, have been repeatedly sustained by the Courts of Review in this State. (Henry v Stewart, 88 Ill. App. 170; affirmed in 188 Ill. 448; Heffner v Herron, 30 Ill. App. 488; affirmed in 185 Ill. 242.)

Other objections were made by appellant, to instructions on the ground that facts necessary to a recovery are assumed in them; and that some of them assume that appellee is entitled to recover a commission; and that some of them are erroneous

expression "instrumental in bringing the defendant and buyer together in different instructions. After a careful consideration of the objections made, we are of opinion that there is no reversible error in the instructions; and that taken together, stated the law with substantial correctness; and the jury could not have been misled by the language used in them, in the way indicated by appellant.

There being no reversible error in the record, the judgment should be affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

200 I.A. 428

BE IT REMEMBERED, that afterwards, to-wit: on MAY 9 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6339.

The People of the State of Illinois.

Defendant in error.

vs -- Error to Co. Ct. McHenry

Edward L. Herrick,

Plaintiff in error.

Per Curiam:

Defendant ~~Plaintiff in error~~, Edward L. Herrick, was, on a trial by the court without a jury, found guilty and fined under an information filed by the states attorney in the county court of McHenry County September 24, 1915. The information as amended ~~amended~~ charged, that on to-wit: the 24th. day of May 1914, at and within said county, Edward L. Herrick, the Defendant ~~plaintiff in error~~ "wilfully, maliciously and without reasonable cause, did abandon in destitute and necessitous circumstances" his wife, Teresa Herrick, "and did then and there neglect and refuse to maintain and provide for her". This was a penal offense under the Wife Abandonment act of 1903 - (J. & A. Stats. par. 3431.) The legislature by an act approved June 24, 1915 (Laws of 1915, page 470) Cal. Stats. Ill. Stats., 1916, ¶ 3433(1) et seq., passed an act providing "That every person who shall without any reasonable cause, neglect or refuse to provide for the support or maintenance of his wife, said wife being in destitute or in necessitous circumstances," shall be punished, etc. omitting the offense of abandonment theretofore existing. This act was in force when the present information was filed. It expressly repealed all other acts or parts of acts in conflict therewith. The states attorney in his brief filed here says that the offense was charged and the case tried under the act of 1915; that the offense under that act consists of neglecting or refusing, without any reasonable cause, to provide for the support or maintenance of the wife in destitute or necissitous circumstances; that the charge of abandonment in

Gen. No. 8888.

The People of the State of Illinois,

Defendant in error,

vs. — Error to Co. Ct. McHenry

Edward L. Herrick,

Plaintiff in error.

Mr. Justice Dunn delivered the opinion of the court:

Edward L. Herrick, was, on a trial by the court without a jury, found guilty and fined under an information filed by the states attorney in the county court of McHenry County September 21, 1925. The information was charged, that on to-wit: the 24th. day of May 1924, at and within said county, Edward L. Herrick, the plaintiff in error, "wilfully, maliciously and without reasonable cause, did abandon in destitute and necessitous circumstances" his wife, Teresa Herrick, "and did then and there neglect and refuse to maintain and provide for her". This was a penal offense under the "Act Abandonment act of 1903 - (1. & A. Stats. par. 6621.) The legislature by an act approved June 24, 1925 (Laws of 1925, page 470) passed an act providing "that every person who shall without any reasonable cause, neglect or refuse to provide for the support or maintenance of his wife, and wife being in destitute or in necessitous circumstances," shall be punished, etc. omitting the offense of abandonment therefore existing. This act was in force when the present information was filed. It expressly repealed all other acts or parts of acts in conflict therewith. The states attorney in his brief filed contends that the offense was charged and the case tried under the act of 1915; that the offense under that act consists of neglecting or refusing, without any reasonable cause, to provide for the support or maintenance of the wife in destitute or

the information is surplusage and should be disregarded leaving only the offense of neglect or refusal to provide. The conviction cannot be sustained even if that view is correct. The issue tried was ~~not~~ raised by ~~a plea of "Not guilty", but under~~ a plea of the defendant "That he is not guilty of wilfully, maliciously and without reasonable cause abandoning in destitute and necessitous circumstances Teresa Herrick in manner and form as charged in the said information, as amended." The finding of the court was that "The said defendant, Edward L. Herrick, is guilty of wilfully, maliciously and without reasonable cause abandoning in destitute and necessitous circumstances Teresa Herrick, in manner and form as charged in said information." There was no issue formed and no finding on the charge of neglect or refusal to provide for the support of his wife.

The evidence seems to show that the defendant was a resident of the State of Wisconsin at the time the information was filed , and at the time the act of 1915 came in force. Whether under such circumstances, a husband failing to support his wife living in Illinois is guilty under the present statute of committing the offense in the county where the wife resides is a question not much argued. We are inclined to the opinion that he cannot be so held. We express no opinion on the facts disclosed by the testimony in the record before us. The judgment is reversed and the cause remanded.

Reversed and remanded.

the information is surplusage and should be disregarded leaving only the offense of neglect or refusal to provide. The construction cannot be sustained even if that view is correct. The issue tried was ~~[illegible]~~ raised by ~~[illegible]~~ a plea of the defendant "That he is not guilty of wilfully, maliciously and without reasonable cause abandoning in destitute and necessitous circumstances Teresa Herrick in manner and form as charged in the said information, as amended." The finding of the court was that "The said defendant, Ernest L. Tarvin, is guilty of wilfully, maliciously and without reasonable cause abandoning in destitute and necessitous circumstances Teresa Herrick, in manner and form as charged in said information." There was no issue joined and no finding on the charge of neglect or refusal to provide for the support of his wife.

The evidence seems to show that the defendant was a resident of the State of Tennessee at the time the information was filed, and at the time the act of 1915 came in force. Whether under such circumstances, a husband failing to support his wife living in Illinois is guilty under the present statute of abandoning the offense in the county where the wife resides is a question not much argued. We are inclined to the opinion that he cannot be so held. We express no opinion on the facts disclosed by the testimony in the record before us. The judgment is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6282

1852

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 430

BE IT REMEMBERED, that afterwards, to-wit: on MAY 9 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6282.

George W. Clendenin, appellee

vs Appeal from Whiteside.

Adams Express Company, appellant.

Per Curiam:

~~Appellant entered a motion in the court below to quash a fee bill. That motion was denied and appellant prosecutes this appeal.~~ Defendant Defendant The motion to quash and the proofs for and against said motion were not preserved by a bill of exceptions. The record proper did not disclose what particular item of the fee bill was assailed. The clerk copied into the record a stipulation of counsel setting up certain alleged facts. That stipulation does not preserve any thing for our consideration The trial judge is entitled to certify to us what motion he heard and what proofs he heard. If this stipulation had been embodied in a bill of exceptions signed by the trial judge then the questions argued would be presented but we have no authorized way of knowing upon this record what was presented or what proofs he heard. The presumption therefore prevails that the court acted correctly in refusing to quash the fee bill. The judgment is affirmed.

Affirmed.

Jan. 30, 1911.

George W. Clendenin, appellee

vs Appeal from Whitesides.

Adams Express Company, appellant.

For Opinion:

Judgment

Judgment

The motion to quash and the proofs for and against said motion being presented by a bill of exceptions. The record proper does not disclose what particular item of the fee bill was assailed. The clerk copied into the record a stipulation of counsel setting up certain alleged facts. This stipulation does not preserve any thing for our consideration. The trial judge is entitled to certify to us what motion he heard and what proofs he heard. If this stipulation had been embodied in a bill of exceptions signed by the trial judge then the questions argued would be presented but we have no authorized way of knowing upon this record what was presented or what proofs he heard. The presumption therefore prevails that the court acted correctly in refusing to quash the fee bill. The judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6177

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

200 I.A. 441

BE IT REMEMBERED, that afterwards, to-wit: on AUG 10 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 4177.

Dw

Penn Mutual Life Insurance Company,

vs.

M. M. Corbin, Administrator of the Estate of Lizzie White, deceased, Arthur B. White and Julia M. Wheeler.

Appeal from Cranwell.

Nichols, J.

Lizzie White, deceased, in her lifetime, ~~[illegible]~~, ~~on the 16th day of [illegible], 1904,~~ took out a life insurance policy in the sum of $2,000, in the Penn Mutual Life Insurance Co., which was payable to the executors, administrators or assigns of the insured. On the 16th day of October, 1904, the policy was assigned by her to her two children, Arthur B. White and Julia M. White, who were minors at that time. The premiums were properly credited by the insured in the manner required by the insurance company, and withdrawn by an order of the insurance company. A duplicate copy of the assignment was furnished by the insurance company and received by the company about October 19, 1904, and the company accepted the assignment as a transfer on the right to the benefits accruing under the policy. The date the assignment was made was shown on the policy, which was produced by the insurance company, and was shown upon.

The insured died on [illegible] of her death the insurance policy [illegible]. Just prior to her death [illegible] will in [illegible]

bequeathed the entire proceeds of the policy [illegible] Lulu [illegible]. [illegible], formerly Lulu [illegible] Hibb. [illegible] will [illegible] wards probated, in the county court [illegible] County, and the defendant, [illegible] Horton, was appointed administrator [illegible] estate. The administrator claimed the proceeds of the policy and thereupon the insurance company filed a bill of interpleader in the circuit court of Carroll County, in which the company set forth the [illegible] relative to the issuance of the policy to the insured and the subsequent assignment thereof to Ben Hibb [illegible], and the fact that the proceeds of the policy were also claimed by the administrator of the estate of the insured. It also appeared from the bill that the net amount due under the policy [illegible] unpaid premiums was $1760.72; that under the terms of the policy an unpaid premium note of $362.40 was to be deducted from the gross amount due under the policy, and the complainant prayed to be allowed to pay the money into court to abide the portion claiming the same could interplead.

Upon the filing of the bill of interpleader [illegible] entered a decree directing the insurance company to pay $1760.72 to the clerk of the court for the benefit of [illegible] who might subsequently be decreed to be entitled [illegible], discharging the insurance company from [illegible] in connection with the matter. The [illegible] referred to a special master in chancery to inquire [illegible] report [illegible] on the defendants interpleaded [illegible] controversy. The master, under [illegible], heard [illegible] offered by the [illegible] parties [illegible].

Evidence was offered before the master not only concerning the net ones pertaining to the assignment, the validity of which was in controversy, but there was also considerable evidence offered concerning the supposed disposition on part of the assets of the insured by her brother, Frank H. Adams, and concerning a supposed contract entered into by Adams with Ruth M. White, on the strength of which it was claimed by Adams she nominated him, as executor, named in the will of the insured, to pay her heirs on $1,000, and to reimburse himself from the proceeds of the policy, when he should collect the same; also evidence tending to prove that Ruth M. White afterwards, at the instance of her husband, repudiated this alleged agreement and that subsequently Adams was arrested in Clinton, Iowa, upon a charge of concealing the will of the insured, and that certain parties, including Ruth M. Wheeler and her husband, Arthur B. White, by means of this arrest, and the threatened prosecution, procured from Adams the payment of $1,000 to Arthur B. White, and also other money. After a hearing upon the bond he had voluntarily paid to Ruth M. Wheeler, by the direction he had received from his sister, the deceased insured, before her death, the sum of $800, and also $800 to Arthur B. White.

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After hearing the evidence, the special master made a report, but exceptions were filed to this report and some exceptions were sustained by the court in its decree. The case is limited that the equities in the case are with M. A. Morrison, of Indianola, who is appellee herein; that Minnie White, on the 16th day of November, 1912, made her will and by it left her entire estate. Death of the proceeds of the policy in question, [illegible] Illinois on the 25th day of November, 1912, [illegible] will [illegible] to

-1- (Henderson, [illegible] (Cont'd page 6)

probate and was in full force and effect at the time of her death;

that at the time of her death, Frank M. Adams was in possession of money and assets of her estate amounting to upwards of $[illegible],000; that he was named as executor in the will mentioned, but because he was a non-resident could not act as such; that shortly after the death of Fannie White, Julu M. Wheeler requested Adams to pay Arthur B. White $1,000 out of the assets of Fannie White then in his hands, with the understanding that the amount due on the policy should be collected by Adams and the $1,000 to be paid Arthur B. White should be deducted from the amount due on the policy when collected by Adams; and the decree further finds that Adams agreed in writing to pay White said $1,000 and that thereafter Julu M. Wheeler attempted to repudiate her agreement with Adams that the $1,000 should be deducted from the amount of the policy when collected by Adams; and further finds, that thereafter, by collusion between Julu M. Wheeler and her husband, and Arthur B. White, and one William Brown, Adams was arrested upon a charge of suppressing the will and incarcerated in the jail at Clinton, Iowa,; that the arrest of Adams was made for the purpose of compelling him to pay Arthur White, and Julu M. Wheeler, money belonging to the estate of [illegible] deceased, which Adams then had, and that while Adams was so under arrest he was compelled, by duress and threats of imprisonment, to pay said White said $1,000, which said Julu M. Wheeler had requested Adams to pay to Arthur B. White, and that he was compelled by such means to pay to said Julu M. Wheeler [illegible], and that all these sums were paid by said Adams out of his own [illegible].

The decree further finds that Lulu M. Wheeler and Adams and Arthur B. White all understood at the time Lulu M. Wheeler requested Adams to pay said $1,000 to said Arthur B. White that the amount of said policy should be collected by the legal representatives of said estate and that said $1,000 should be deducted from the amount due on said policy.

The decree also finds that Lulu M. Wheeler and Arthur B. White are estopped by their conduct, as aforesaid, from disputing the right of the legal representatives of said estate to collect the amount due on the policy in question, and that in equity and good conscience the amount due on the policy should be collected by the administrator of the estates; and the decree finds that J. J. Forbes, administrator of the estate, should in equity and good conscience be allowed to collect the amount due on the policy and should have the right to an equitable lien on ~~the policy~~ said amount so collected for the purpose of reimbursing the estate for said sum of $1,000 paid by Adams to White under duress, and for the further sum of $264. paid by Adams out of the assets of the said estate through the exercise of duress and threats, and that the balance of the fund should be distributed by the administrator under the terms of the will; and it was ordered in the decree that the administrator be given a lien upon the amount in the hands of the clerk for the purpose of reimbursing the estate for said $1,000 paid to Arthur B. White by Adams and for the $264. paid to Lulu M. Wheeler by Adams.

It is apparent that the decree attempts to adjudicate upon matters which were not in issue, and in no way connected with the question arising under the interpleader, and adjudicates

rights and liabilities resulting from a contract alleged to have been entered into by one of the parties to the litigation with Frank H. Means, who was not a party to this suit; also adjudicates matters concerning moneys paid under an alleged duress, and as the result of a conspiracy alleged to have been entered into by some of the parties to the suit with other parties not connected with the suit, to bring about the procurement of money from Frank H. Means.

Frank H. Means, who was named as executor of the last will of the insured, Minnie White, never became the legal representative of the estate, and never had qualified, or attempted to qualify, as executor. The transactions between him and Arthur D. White and Lulu M. Wheeler concerning the assets of the estate and the payment to Arthur D. White and Lulu M. Wheeler of alleged assets of the estate appear to be wholly foreign to the issues involved. Frank H. Means was a witness in the case, and testified that there never were any assets of the estate of Minnie White in his hands from which any payment could be made; that she had donated to him all the assets of her estate before her death, and that she left none except the insurance policy. Inasmuch as he was not the legal representative of the estate, and did not at any time handle any of the assets of the estate, whatever arrangement he may have made with either of the parties named concerning the payment of money to them, or either of them, was purely a personal matter in which the estate was not legally concerned, and if certain parties wrongfully caused him to pay money his remedy was a personal one, and not one that would pass to the administrator of an estate. In my view of the case the numerous [illegible] are alleged to have arisen among the parties at interest, [illegible],

were presented in their nature which the legal representatives of the estate, who was afterwards appointed in Carroll County, had no concern whatever.

If Frank L. Adams, as a matter of fact, had any assets of the estate of the deceased in his possession, the law points a way for the administrator to proceed in order to obtain them. If the administrator has a legal claim upon the proceeds of the insurance policy on any lien thereon it is not because of any acts or contract made by Frank L. Adams with Arthur L. White; or because of money paid by Adams to Arthur L. Theodore or Arthur B. White. And if Frank L. Adams acquired any rights concerning the proceeds of this policy it is clear that such rights should not be adjudicated in a suit in which he was not a party; nor could such rights be transferred for adjudication to the administrator of the estate of the insured.

The only real matter in issue under the pleadings is whether the child or children of Minnie White were entitled to the proceeds of the policy under the assignment. If the assignment was valid the heirs at law of Minnie White, then the proceeds of the policy rightfully belong to them; if the assignment was not valid, then the administrator would be entitled to such proceeds. In this state of the case the question, and the decision, no other question could properly be litigated. (Myers v Sanson, 1. C Co. Ill Ill. App. 475; Myers v Myers, 251 Ill. 437)

The whole controversy, therefore, turns upon the validity of the assignment which was duly executed. It is contended by the appellee, Norden, that the assignment was not valid, because

one, inasmuch as there was no delivery of the policy. Nor policy after the assignment to the insured's children, having remained in the possession of the insured; and because it is clear that the assignment was not attached to the policy.

The requirement that an assignment should be attached to the policy was one made by the insurance company, and might form the basis of an objection by the insurance company; but inasmuch as no objection was raised to the assignment by the insurance company, the legal representative of the insured is not in position to effectively question the validity of the assignment on that account. (Green v Mutual Life Ins. Co., 98 Ill. App.307; Johnson, et al, v Van Epps , 110 Ill. 551; Martin v Stoddings, 196 Ill. 587; Life Society v Erwin, 8 Mo. App. 416; Smith v R.E. & M.W. Ben.Asso. 96 Ill. 303)

Viewing the assignment of the policy in the light of a voluntary settlement of the proceeds by the insured upon his minor children, a manual delivery of the policy was not necessary. And in cases of this kind the matter of delivery is merely a question of the intention of the grantor or donor. No particular form or ceremony is necessary to constitute a delivery. It may be by acts without words, or by words without acts; or by both. Anything that clearly manifests an intention to deliver and part with the property involved constitutes a sufficient delivery. Hence the very essence of delivery is the intention of the party. (Dwyer et al v Dwyer, 3 Gilman 547)

So in Thornbury v Thornbury, 13 Ill. 210 where the

question arose upon the validity of a deed upon the matter of its delivery, and where the grantor had sent the deed to the recorder and had it recorded, but without the knowledge of the grantee, and where the grantee did not obtain possession of the deed until after the grantor's death; it was held that if the grantor, with or without any previous arrangement with the grantee, had signed, sealed and acknowledged a deed, placed it in the hands of the registrar to be recorded, notified the grantee of the act and he assented to receive it, by words only, this would be a good delivery, though the grantee died before taking it into his actual possession because the assent is the principal element, and taking the deed into the grantee's possession is not indispensable, but only evidence of assent and acceptance.

In the case of minors or infants where a voluntary settlement is made for their benefit, an acceptance is presumed. The court says in Patterson vs Cheek, 85 Ill. 73 in reference to the matter of delivery in the case of infants: "All the cases cited on both sides are reconcilable on this consideration--that the intention is, and must be, the controlling element. In a case like this, where the conveyance was voluntary, and an infant who died before he attained an age to accept or reject the conveyance, a delivery and acceptance will be more readily presumed than in the cases to which reference is made by appellant's counsel. The principle being established that an infant of tender years can take by deed, not having at the time a sane discretion to accept or refuse, and dying before that period arrives, and the grantor having performed every act he could conform to pass the title to the infant, and it being for his benefit, it is fair to presume he has assented to it."

The principle established in the cases referred to concerning delivery and the presumptions arising in reference thereto in cases of infancy, have been reiterated by our supreme court in a number of cases. (Tiffard v Walker, 59 Ill. 419; Reed v Douthit, 60 Ill. 548; Union Mutual Ins. Co. v Campbell, 94 Ill. 267; Weber v Christen, 121 Ill. 91; Williams v Williams, 148 Ill. 426; Miller v Meers, 155 Ill. 384; Abbott v Abbott, 189 Ill. 4.8; Baker v Hall, 214 Ill. 364.)

The proof shows that at the time of the assignment in question the two children of Minnie White were living at home with their mother, and that they were infants of the ages of 11 and 13 years respectively. And the intention of the insured to transfer the proceeds of the policy to the children is clearly manifested by the fact that she made the assignment in due and proper form and executed it in duplicate, and sent to the company one of the duplicates to satisfy the requirements made by the company in that regard to procure their assent to the assignment and to make sure that the proceeds of the policy would be paid to the children instead of to her estate. There was nothing further that she could have done to more effectively indicate that by the assignment she intended to make the children the beneficiaries of the proceeds of the policy. A manual delivery of the policy was not wisely practicable, nor was it necessary under the authorities cited; the acceptance by the children must be legally presumed it being an assignment for their benefit. As a voluntary settlement upon the minor children, there was a sufficient legal delivery to give the assignment binding effect.

But the assignment in question was in legal effect and as a matter of fact simply a change of beneficiary. This policy, which was taken out by the insured, and made payable to her executors, administrators and assigns, is in the same legal category as if it had been made payable to herself, and she had the same power over it as if it had been originally payable to herself. (Johnson v Von Hopps, 110 Ill. 551) In the case just cited the court says: " The contract being between the insurer and the party whose life is insured, so long as the latter retains possession of the policy he has the right, with the consent of the insurer, to change the contract of insurance so as to give the proceeds of the policy, upon his death, to a different beneficiary, or to change it in any other manner the contracting parties may agree upon not contrary to law or good morals. That this position is supported by many analogies of the law as well as by express adjudications must be conceded. (Clarke v Dunnel, 18 Wis. 248; Norman v Howard, 25 id. 108; Foster v Gile, 50 id. 605, and Gombs v Mutual Life Ins. Co. 50 Mo. 44.)"

We are of the opinion, therefore, that the real effect of this assignment of the policy, which was accepted and acquiesced in by the insurance company, was a change of the beneficiary, and a delivery of the policy, for this purpose, is not necessary. It is not necessary in order effectively to name a person a beneficiary in an insurance policy that the policy should be delivered to such person; nor is a delivery of the policy necessary to the beneficiary who is substituted in the place of the original beneficiary.

We conclude, therefore, that at the time of the death of the insured, Minnie White, her two children were the real

beneficiaries of the policy in question and hereby orders that the proceeds thereof in the hands of the circuit clerk.

For the reasons stated it should have been decreed that the proceeds of the policy in the hands of the clerk of the circuit court be paid to Arthur E. White and Julu H. Wheeler, each taking one half; and that the administrator of the estate of Minnie White, deceased, had no interest in or claim upon the fund in question. The decree is therefore now reversed and the cause remanded with directions to enter a decree in accordance with the views herein expressed.

Reversed and remanded with directions.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6195

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

200

BE IT REMEMBERED, that afterwards, to-wit: on AUG 10 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No.8195.

Payton J. Tuohy, appellant.

vs Appeal from Will.

Chicago & Joliet Electric

Railway Co. appellee.

Niehaus, J.

This is a suit brought by Payton J. Tuohy, an attorney at law, by petition, to establish an attorney's lien under Section 1 of the act of the General Assembly, passed in 1909 creating an attorney's lien; and to enforce the same, against the appellee, Chicago & Joliet Electric Railway Co. The petition avers, that James W. Miner, of the city of Joliet and County of Will, retained the petitioner to represent him, as personal representative of Harold Miner, deceased, in probating the estate of the deceased; and also in an action for personal injuries resulting in the death of said Harold Miner such action to be brought against the Chicago & Joliet Electric Railway Co. ; that the petitioner on or about the 28th. day of October 1912, entered into a contract with said Miner, whereby he was to receive for his services rendered in that behalf, a fee of one third of the amount recovered against the Chicago & Joliet Electric Railway Co.; that in compliance with the terms of the aforesaid agreement, he attended the inquest over the body of the aforesaid Harold Miner, deceased, and examined all the witnesses before the coroner; that on or about the 31st. day of October 1912, he served upon the Chicago & Joliet Electric Railway Co. a notice of attorney's lien; that thereafter James W. Miner and the Chicago & Joliet Railway Co. compromised the said claim, with James W. Miner as administrator of the estate of Harold Miner, deceased, and that the sum of $600 was paid

Appeal from Will.

Mr. Justice Brentano.

Petition for a writ of mandamus.

Affirmed.

This is a suit brought by Byron E. Tuohy, an attorney at law, by petition, to set aside an attorney's lien under section 1 of the act of the General Assembly, approved in 1908 entitled an attorney's lien; and to enforce the same against the appellee, Chicago & Joliet Electric Railway Co. The petition avers, that James V. Viner, of the city of Joliet, Will County of Will, retained the petitioner to represent him, as general representative of Harold Viner, deceased, in recovering the estate of the deceased; and also in an action for wrongful injuries resulting in the death of said Harold Viner and action to be brought against the Chicago & Joliet Electric Railway Co.; that the petitioner on or about the 28th. day of October 1913, entered into a contract with said Viner, whereby he was to receive for his services rendered in that behalf, a fee of one third of the amount recovered against the Chicago & Joliet Electric Railway Co.; that in compliance with the terms of the aforesaid agreement, he filed the impeat over the body of the deceased Harold Viner, deceased, and received all the evidence before the coroner; that on or about the 21st. day of October 1913, he served upon the Chicago & Joliet Electric Railway Co. a notice of attorney's lien; that thereafter James V. Viner and the Chicago & Joliet Railway Co. compromised the claim, with James W. Viner as administrator of the estate of Harold Viner, deceased, and that the sum of $[illegible] was paid

to James W. Miner, as administrator, in full of all claims without the knowledge of the petitioner, and without any notice having been given petitioner.

The petition also averred, that the notice required by the Statute to be given, was served, and filed, in order to establish the lien; and was served and filed as required by law, and the petition prayed, that James W. Miner, administrator of the estate of Harold Miner, deceased, and said Chicago & Joliet Railway Co. a corporation, be made parties defendant, and be required to make answer to the petition; and that the defendants ~~may~~ be decreed to pay the petitioner such sum as he is entitled to, as fees for the services contracted for.

The notice which was served on the appellee, is as follows:-
"Notice of attorney's lien.
To the Chicago & Joliet Electric Railway Company, a corporation: You are hereby notified that the undersigned has been retained and employed as attorney at law by James W. Miner as his attorney, to ask, demand, receive, compromise and settle a certain suit, claim, demand and cause of action against you for personal injuries resulting in death to one Harold Miner.

"You are further notified that in consideration of services rendered and to be rendered, we are to have and receive a sum equal to one third (1/3) of the amount recovered on account of such suit, claim, demand and cause of action; that we have and hereby claim a lien upon any verdict, judgment, decree, compromise or settlement entered or arrived at, and that under an act of the general assembly of the State of Illinois entitled "an act creating attorney's liens and for the enforcement thereof", in force July 1, 1909, you are to make no settlement of said claim, etc., without my consent and without satisfying my said claim for fees and services.

to James W. Miner, as administrator, in full of all claims against the knowledge of the petitioner, and without any notice having been given petitioner.

The petition also avers that the notice required by the Statute to be given, was served, and filed, in order to establish the lien; and was served and filed as required by law; and the petition prays that James W. Miner, administrator of the estate of Harold Miner, deceased, and said Chicago & Joliet Railway Co. a corporation, be made parties defendant, and be required to make answer to the petition; and that the defendants be decreed to pay the petitioner such sum as he is entitled to, as fees for the services rendered.

The notice referred to avers as follows:

"Notice of attorney's lien.

To the Chicago & Joliet Electric Railway Company, a corporation: You are hereby notified that the undersigned has been retained and employed as attorney at law by James W. Miner as his attorney in any and all claims, demands, or causes of action, or any suit, claim, demand, or cause of action, which you may have against him, or against the estate of Harold Miner, deceased.

"You are further notified that in consideration of services rendered and to be rendered, we are to have and receive a lien equal to one third (1/3) of the amount recovered on account of such suit, claim, demand, or cause of action; that we have an attorney claim a lien upon any verdict, judgment, decree, compromise or settlement entered or arrived at, and that under an act of the general assembly of the State of Illinois entitled "an act creating attorney's liens and for the enforcement thereof", in force July 1, 1909, you are to make settlement of said claim, etc., without by counsel and

"Dated at Chicago, Illinois, this 31st. day of October A.D. 1912. Exhibit"A". Payton J. Tuchy."

The notice was served by mailing the same to the appellee Railway Co. and was received by the company in due course of the mails. Upon a hearing of the petition, it was dismissed by the court for want of equity; and from the order dismissing the petition, this appeal is taken.

It appears from the evidence, that the contract for services to be rendered by the petitioner, was made with James W. Miner individually; and not with him as administrator of the estate of Harold Miner. deceased; and that James W. Miner, who, subsequently to making the contract for the attorney's fees claimed, was appointed administrator of the estate of Harold Miner, deceased, does not appear to have, as such administrator, in any way recognized, ratified or adopted said contradt; and that so far as the estate is concerned, the matter was left in the same position as it would have been, if some other person had been appointed administrator. The claim of the petitioner, therefore, appears to be against James W. Miner individually; and the notice which he served upon the appellee is concerning a contract for services with J. W. Miner individually; and does not in any way state, that he has or expects to have a contract with him as administrator of the estate, nor a claim against the estate for services.

It does not appear, that James W. Miner had any case or action or demand against the appellee, which was compromised or settled. And inasmuch as neither the contract, nor the notice, cover any compromise or settlement or lien for any attorney's fees, due from the administrator of the estate of Harold Miner, deceased; nor for any action, claim or demand of said estate against the appellee, the legal basis for a lien is not established.

"Costs at Chicago, Illinois, this 24th. day of January A.D. 1910. Samuel A. Ryan, J. Judge."

The notice was served by mailing the same to the Chicago Railway Co. and was received by the company in the course of the mails. Upon a hearing of the petition, it was allowed by the court for want of jurisdiction, and from the order therein, the petitioner, Hill, appealed to the Appellate Court.

It appears from the evidence, that the contract for services to be rendered by the petitioner, Hill, and with Lucien L. Miner individually and not with him as administrator of the estate of Patrick Miner, deceased. Hill and Lucien L. Miner, individually formulating the contract for the administrator, claimed, the appointed administrator of the estate of Patrick Miner, deceased, does not appear to have, as such administrator, in any way participated, initiated or, indeed, authorized; and that so far as the estate is concerned, the matter was left in the same position it is, should have been, if some other person had been appointed administrator. The claim of the petitioner, therefore, appears to be against Lucien L. Miner individually and has nothing which to attach upon the appellee is concerning a contract for services with L. W. Miner individually and has not in any way, that he has or expects to have a contract with him as administrator of the estate, nor a claim against the estate for services.

It does not appear, that Lucien L. Miner has any interest or action or demand against the appellee, which has been realized or settled. And inasmuch as neither the contract, nor the matter, cover any connection or relationship of him in any capacity's lies, and from the administrator of the estate of Patrick Miner, deceased; and for the reason, [illegible] of said estate [illegible], [illegible]

The evidence shows also, that the service of the notice in this case was by mail. A notice to establish a statutory lien, where the manner of service is not pointed out by the Statute, requires a personal service of such notice. (Haj v American Bottling Co. 261, Ill. 362.)

Appellant insists, that because the appellee admits in his answer, that petitioner served the notice in question, it is not in a position to raise the question of the validity of the service. We are of opinion, however, that the admission merely relates to the fact of a service of a notice; and does not admit, that such service was in compliance with the requirements of the Statute. It is clear, under the decision in the Haj case supra, that a personal service on appellee of the notice, was necessary, as a condition precedent to the establishment of a lien, if the petitioner had one.

For the reasons stated, we are of opinion that the court did not err in dismissing the petition; and the decree should be affirmed.

Affirmed.

The evidence shows also, that the service of the notice in this case was by mail. A notice to establish a statutory lien, where the manner of service is not pointed out by statute, requires a personal service of such notice. (Dalzell v Aspinwall Building Co. 4Ad. 111. 324.)

We just indicate, that because the appellee admits in his answer, that petitioner served the notice in question, it is not in a position to raise the question of the validity of the service. We are of opinion, however, that the admission merely relates to the fact of a service of a notice; and not that it admit, that such service was in compliance with the requirements of the Statute. It is clear, under the decision in the last case supra, that a personal service on appellee of the notice, was necessary, as a condition precedent to the establishment of a lien, if the petitioner had one.

For the reasons stated, we are of opinion that the court did not err in dismissing the petition; and the decree should be affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

619

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

2001.A.048

BE IT REMEMBERED, that afterwards, to-wit: on AUG 10 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6198

Louis Schildmiller, appellee

vs Appeal from Co. Ct. Rock Island.

Cigarmakers International

Union of America et al

appellants.

Niehaus, J.

This is an appeal by the Cigarmakers International Union of America, and the Cigarmakers International Union of America Local No. 201, from a judgment for $550 rendered against them jointly, in favor of the appellee, Louis Schildmiller, in the county court of Rock Island County. The suit was instituted to recover for a death benefit, which appellee claimed accrued to him, as a son of a deceased member of the appellant organizations.

It appeared from the evidence that the father of the plaintiff Henry Schildmiller, was at the time of his death in good standing as a member of the ~~appellant~~ defendant Cigarmakers International Union of America Local No. 201; and that he had been such member for more than fifteen years prior to his death, which occurred on or about February 15, 1914; that under the constitution and by-laws of the organization named, it is provided, that upon the death of such a member, a death benefit of $550 shall be paid to any person designated in writing by such member; or if he fails to designate a person in writing such death benefit shall be paid to his widow; and if there be no widow, then to his minor children; and if there be no widow nor minor children, then to any relative of the deceased member who, at the time of his death, is dependent for support, in whole or in part upon such deceased member.

It appeared that the deceased did not designate any one

Gen. No. 9182

Louis Schildmiller, appellee

vs. Appeal from Co. Ct. Rock Island.

Glaziers International

Union of America et al

appellants.

Bidwell, J.

This is an appeal by the Glaziers International Union of America, and the Glaziers International Union of America Local No. 801, from a judgment for $850 rendered against them jointly, in favor of the appellee, Louis Schildmiller, in the county court of Rock Island County. The suit was instituted to recover for a death benefit, which appellee claimed accrued to him, as a son of a deceased member of the appellant organizations.

It appears from the evidence that the father of the Henry Schildmiller, was at the time of his death in good standing as a member of the Glaziers International Union of America Local No. 801; and that he had been such member for more than fifteen years prior to his death, which occurred on or about February 15, 1914; that under the constitution and by-laws of the organization named, it is provided, that upon the death of such a member, a death benefit of $850 shall be paid to any person designated in writing by such member; or if he fails to designate a person in writing, such death benefit shall be paid to his widow; and if there be no widow, then to his minor children; and if there be no widow nor minor children, then to any relative of the deceased member who, at the time of his death, is dependent for support, in whole or in part, upon such deceased member.

It appears that the deceased is not shown to have

in writing as beneficiary; and that he left no widow, nor minor children; but did leave surviving him, his son, the ~~appellee~~ plaintiff, who claims, that he was partly dependent upon his father for support.

Two questions are raised on appeal, - first, that it affirmatively appears, from the evidence in the case, that there is no joint liability of the appellants; secondly, that the appellee was not in any way dependent upon his father, the deceased member. Upon the question of the joint liability it is urged by appellants, that there are two organizations, one national in character, and the other local; and that the National organization, and not the Local organizations, is liable. ~~But~~ The evidence shows that the local organization is a part of the national organization; and under its control; that the local organization collected for, and had the custody of the benefit fund out of which death benefits were payable; and the national organization controlled the fund, of which the local organization had the custody; that the local organization was prohibited by the by-laws of the organization, from paying death benefits, except by the direction of the national organization. It is apparent, that payment of a death benefit is effected by the joint action of the two organizations; and that each had a constituent part to perform in order to effectuate payment. Under these circumstances the suit was properly brought against both jointly. (United Workmen etc. v Zuelke, 189 Ill. 298).

We are of opinion, upon the question of dependency, that the evidence tended to prove, that as a matter of fact, the appellee was partly dependent for support, upon the earnings of the deceased member. The deceased member was a widower, and living with the ~~appellee~~ plaintiff, who was his only son; and ~~the~~ this

in writing as beneficiary; and that he left no widow, nor minor children; but did leave surviving him, his son, the [illegible], who claims, that he was partly dependent upon his father for support.

Two questions are raised on appeal, - first, that it affirmatively appears, from the evidence in the case, that there is no joint liability of the appellants; secondly, that the appellee was not in any way dependent upon his father, the deceased member. Upon the question of the joint liability it is urged by appellants, that there are two organizations, one national in character, and the other local; and that the National organization, and not the local organizations, is liable. But the evidence shows that the local organization is a part of the national organization; and under its control; that the local organization collected for, and had the custody of, the benefit fund out of which death benefits were payable; and the national organization controlled the fund, of which the local organization had the custody; that the local organization was prohibited by the by-laws of the organization, from paying death benefits, except by the direction of the national organization. It is apparent, that payment of a death benefit is effected by the joint action of the two organizations; and that each had a constituent part to perform in order to effectuate payment. Under these circumstances the suit was properly brought against both jointly. (United Workmen etc. v Zuelke, 180 Ill. 383).

We are of opinion, upon the question of dependency, that the evidence tended to prove, that as a matter of fact, the appellee was partly dependent for support, upon the earnings of the deceased member. The deceased member was a widower; and living with his [illegible], the [illegible]

living with his son, and for at least two years prior to his death, ~~he had worked for the Rock Island Company Railroad Company, as flagman,~~ he earned $30 per month, for nine month s of the year; ~~but that he was unable to work during the winter months.~~ He paid ~~his earnings~~ over to his son, ~~and they were~~ who used ~~them~~ it for the support of himself, his family and household, of which the deceased was a member. The earnings of his father was the only money, outside of his wages, which ~~appellee~~ plaintiff had or could depend on, for the support of himself and family, ~~and the evidence shows that~~ The ~~appellee~~ plaintiff was earning at the rate of $50 per month; and ~~that~~ the amount required for such support, varied from about $87. to $93 per month. The father while living with the ~~appellee~~ plaintiff, received as a part of ~~ki~~ this family expense, from the ~~appellee~~ plaintiff not only food and clothing, but small incidentals, such as tobacco.

Appellants contend, that these facts do not show, that appellee was even partly dependent upon his father for support. But we are of opinion, that they do show, as a matter of fact, that the appellee was at least partly dependent upon his father, for support. Whether a person is dependent upon another for support, is a question of fact. It is not necessary that the dependency should be the consequence of a legal duty; but it is sufficient if it be a dependency in fact. Whether there is such dependency, is a matter which must necessarily be determined from the circumstances and conditions presented in each particular case. (Royal League v Shields, 251 Ill. 250.)

At the time of the death of appellee's father, it is evident, that the wages which he earned, to a substantial extent, entered into the matter of the support of appellee, and his family, The particular extent to which appellee

living with his son, and for at least two years prior to his death, [illegible]

[illegible]

[illegible] of the year [illegible]

[illegible] Monmouth, [illegible] of his father was the only money, usually at his disposal, which [illegible] had or could derive on, for the support of himself and family. [illegible]

was earning at the rate of $50 per month; and the amount required for such support, varied from about $25. to $[illegible] per month. The father while living with the [illegible] received as a part of his family expense, from the [illegible] not only food and clothing, but small luxuries, such as tobacco.

Appellants contend, that these facts do not show, that appellee was even partly dependent upon his father for support. But we are of opinion, that they do show, as a matter of fact, that the appellee was at least partly dependent upon his father, for support. Whether a person is dependent upon another for support, is a question of fact. It is not necessary that the dependency should be the consequence of legal duty; but it is sufficient if there is a dependency in fact. Whether there is such dependency, is a matter which must necessarily be determined from the circumstances and conditions presented in each particular case. (Hagg[illegible] v Shields, 251 Ill. 380.)

At the time of the death of appellee's father, it is evident, that the wages which he earned, to a substantial extent, entered into the matter of the support of appellee,

was dependent is not material. It is sufficient if in any substantial extent, he depended on his father's earnings. One who is sustained by another, or relies upon his aid in the matter of support, is dependent upon him to the extent of that aid. (Alexander v Parker, 104 Ill. 355.)

We are of opinion, that the suit in question was properly brought against the appellants jointly; and that appellee, under the provisions of the by-laws of the appellants organizations, was entitled to the death benefit in question, as a relative partly dependent upon the deceased member, who it is admitted, had been a member in good standing for more than fifteen years.

The judgment therefore should be affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6245

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

200 I.A. 464

BE IT REMEMBERED, that afterwards, to-wit: on AUG 10 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6245.

Davis Milk Machinery Co. a Corp.

Deft. in error.

vs Error to Grundy.

A. D. Tappen, Pltf in error.

Niehaus, P. J.

The Davis Milk Machinery Co. defendant in error, sued out a writ of replevin in the circuit court of Grundy County, against A. D. Tappen, plaintiff in error, and W. L. Avery, to recover possession of a milk filler, and a milk bottle capper, which defendant in error claimed were unlawfully detained by plaintiff in error, and said W. L. Avery. The replevin writ was served on ~~the plaintiff in error~~ defendant, and the property mentioned was taken from his possession, and turned over to the possession of the ~~defendant in error~~ plaintiff. No service was had on W. L. Avery, and the suit was afterwards, and before the trial, dismissed as to him.

~~Defendant in error~~ Plaintiff filed a declaration in replevin, and to this declaration added a count in assumpsit, declaring on a promissory note executed and delivered to it by W. L. Avery. The case proceeded to trial by jury, who returned a verdict sustaining the issues raised by the declaration in replevin, finding the ownership and possession of the property described, to be in the ~~defendant in error~~ plaintiff, and assessing its damages at $50. The court entered a judgment upon the verdict and directing that the ~~defendant in error~~ plaintiff have and retain the property replevied; and that he recover of and from the plaintiff in error damages in the sum of $50., as fixed by the verdict; and the costs of suit.

The plaintiff in error afterwards, sued out this writ of error, to reverse the judgment; and as a basis for the

Geo. Ho. Cook.

Davis Milk Machinery Co. a Corp.

Defd. in error.

vs

Error to Grundy.

A. D. Tappen, Pltf in error.

Kirkham, J. delivered the opinion of the court.

The Davis Milk Machinery Co. commenced in error, sued out a writ of replevin in the Circuit Court of Grundy County, against A. D. Tappen, plaintiff in error, and W. E. Avery, to recover possession of a milk filler, and a milk bottle capper. Upon referendum in error claimed was unlawfully detained by plaintiff in error, and said W. L. Avery. The replevin writ was served on the defendants in error, and the property mentioned was taken from his possession, and turned over to the possession of the defendant in error. No service was had on W. L. Avery, and the suit was abated, and before the trial, dismissed as to him.

Defendant in error filed a declaration in replevin, and to this declaration filed a court in assumpsit, declaring on a promissory note executed and delivered to it by W. E. Avery. The cause proceeded to trial by jury, who returned a verdict sustaining the issues raised by the declaration in replevin, finding the ownership and possession of the property described, to be in the defendant in error, and assessing the damage at $50. The court entered a judgment on the verdict and directing that the defendant in error have and retain the property replevied; and that he recover of and from the plaintiff in error damages in the sum of $50., as fixed by the verdict; and the costs of suit.

The plaintiff in error wherewith, sued out this writ of error, to reverse the judgment; and on a hearing for the

writ, assigned the following errors; "First the court erred in entering judgment without appearance or plea by the plaintiff in error, without issue being joined; and without default having been entered against plaintiff in error. Second, that said judgment is contrary to law." The record, however does not sustain the claim made by plaintiff in error, in the errors assigned. It shows, that when the case was called for trial upon issues joined by the parties to the suit, the parties appeared by their respective attorneys; and, that thereupon a jury was called, and sworn to try the issues joined; and to render a true verdict in accordance with the evidence.

In the absence of a bill of exceptions setting out the evidence, it must be presumed conclusively, that the verdict, which the jury rendered, was sustained by the evidence adduced at the trial.

It does not appear from the record, that a formal plea was filed, but this cannot be assigned for error, if the parties voluntarily proceeded to trial without the formality of a plea. Issues could be joined in the case without the filing of such a plea. It was held, in one of the earliest cases reviewed by our Supreme Court, that the appearance of the parties in a case tried, cured defects in pleadings arising from a failure to file a plea. (Brazzle v Usher, Beecher's Breese, 35.) And it is the settled rule of law in this state, that if parties allow a suit to go to trial, without filing a plea, or without formal issue; or without formal pleadings, the error is cured by the verdict. (Ross v Reddick, 1 Scam. 73; Armstrong v Mock, 17 Ill. 166; Spencer v Langdon, 21 Ill. 193; Kelsey v Lamb, 21 Ill. 539; Loomis v Riley, 34 Ill. 307; Devine v Chicago City Ry. Co. 237 Ill. 280. Cook v City of Marseilles, 139 Ill. App. 536;

ruit, assigns the following errors: "First the court erred in granting judgment without appearance or plea by the plaintiff in error, without issue being joined; and judgment having been entered against plaintiff in error. Second, that such judgment is contrary to law." The record, however, does not contain the claim made by plaintiff in error, in the errors assigned. It seems, that when the case was called for trial upon issues joined by the pleadings to the suit, all parties appeared by their respective attorneys; and, that thereupon a jury was called, and sworn to try the issues joined; and to render a true verdict in accordance with the evidence.

In the absence of a bill of exceptions setting out the evidence, it must be presumed conclusively, that the verdict, which the jury returned, was authorized by the evidence adduced at the trial.

It does not appear from the record, that a formal plea was filed, but this cannot be assigned for error, if the parties voluntarily proceeded to trial without the formality of a plea. Issues could be joined on the same without filing of such a plea. It was held, in one of the earliest cases reviewed by the Supreme Court, that an appearance of the parties in open court, waives the right to pleadings arising from a failure to file a plea. (Hunter v. Baker, Beaumont's Reports, 38.) And if in the earliest days of law in this state, that it permitted that it was waived, without filing a plea, or without formal joinder of issue; without formal pleadings, it seems to be a matter of [illegible] (Ross v. Heilbok, 1 Sneed. 74; Jennings v. Ross, 17 Ill. 162; Spencer v. Langdon, 32 Ill. 192; Kersey v. Garr, 21 Ill. 465; Lowrie v. Riley, 26 Ill. 267; Davies v. Chicago City Ry. Co., 147 Ill. 400. Such a code of procedure, 188 Ill. 4[illegible]

First Nat. Bank v Miller, 139 Ill. 608; affirmed in 335 Ill. 139.)

It is quite apparent from the verdict of the jury, that the count in assumpsit, which was improperly added to the declaration in replevin, was wholly disregarded in the trial of the case; and that the issue tried was upon the allegations of the declaration in replevin. No objection was raised by the plaintiff in error, in the court below, to the improper joining of the assumpsit ~~count~~ count to the declaration; and therefore this question which is argued in plaintiff in error's brief, is not really before us; and there is no assignment of error concerning it.

The record does not disclose any reversible error and the judgment should therefore be affirmed.

Judgment affirmed.

First Cat. Cash v Miller, 102 Ill. 655; affirmed in 4th Ill. 146.)

It is quite apparent from the verdict of the jury, that the count in assumpsit, which was improperly added to the indictment in replevin, was wholly disregarded in the trial of the case; and that the trial court was upon the evidence of the defendant in replevin. The judgment was clearly in error, in the second place, in the direction of the assumpsit count in the indictment; and therefore this question, which is argued in plaintiff in error's brief, is not really before us; and there is no assignment of error concerning it.

The record does not disclose any reversible error, and the judgment should therefore be affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 465

BE IT REMEMBERED, that afterwards, to-wit: on AUG 10 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6347.

Harry Allison, appellee

vs Appeal from Boone.

Belvidere Screw & Machine

Co. appellant.

Nichaus, P. J.

The appellee, Henry Allison, brought this suit to recover a balance claimed to be due him, as a screw machine operator, for wages, from the Belvidere Screw & Machine Co. appellant. The case was originally brought before a justice of the peace, in Boone County, where the appellee obtained judgment for the full amount of his demand, namely $68.60. An appeal was taken to the circuit court, and a jury trial had, which resulted in a verdict in favor of appellee for $50. The appellant made a motion for a new trial, which was overruled by the court, and a judgment was entered upon the verdict; from which judgment the appellant prosecutes this appeal.

It was conceded in the court below, that the ~~appellee~~ plaintiff had worked for ~~appellant~~ defendant 196 hours, for which he had not been paid; and that the wages he received for such work was at the rate of 35¢ per hour; which would amount to the sum of $68.60; but ~~appellant~~ defendant claimed that the ~~appellee~~ plaintiff, in his employment as a screw machine operator, in turning out some ~~bxxxx~~ bushings, which the ~~appellant~~ defendant had a contract to manufacture and deliver to the Fox Machine Co., had done some of his work defectively; which resulted in damages to the ~~appellant~~ defendant, to the amount of $37.45; and sought to recoup these damages, against the amount admitted to be due ~~appellee~~ plaintiff.

~~Appellant~~ Defendant contends that the judgment should be reversed, for two reasons: First, because the verdict on the

Cum. Co. Court.

Henry Gibson, Appellee

Vs. Appeal from Boone.

Davidson Brown & Moshine

Co. Appellant.

Hiscock, J. P.

The appellee, Henry Gibson, brought this suit to recover a balance claimed to be due him, as a horse racing operator, for wages, from the Davidson Brown & Moshine Co. The case was originally brought before a justice of the peace, in Boone County, where the appellee obtained judgment for the full amount of his demand, namely $25.00. An appeal was taken to the circuit court, and a jury trial had, which resulted in a verdict in favor of a petite for $20. The appellant made a motion for a new trial, which was overruled by the court, and a judgment was entered upon the verdict; from which judgment the appellant prosecutes this appeal.

It was conceded in the court below, that the appellee had worked for appellant 125 hours, or which he had not been paid; and that the wages he received for such work was at the rate of 30¢ per hour; which would amount to the sum of $25.00; but appellant claimed that the appellee, in his employment as a horse racing operator, in training and exhibiting horses, which the appellant had a contract to manufacture and deliver to the Fair Association, &c., had made a saving of $5 respectively; which saving in damages to the appellant, to the amount of $20.00; it appeared in evidence, reduced the amount claimed to be due appellee.

Appellant contends that the judgment should be reversed, for the reasons, first: because the verdict is not

question of damages ~~is~~ was manifestly against the weight of the evidence; and secondly, that the court erred in giving the first instruction requested by the ~~appellee~~ plaintiff.

~~Appellant~~ Defendant urged, that the jury in their verdict, allowed only about one half of the amount of damages claimed in recoupment; and that the verdict in this respect, ~~is~~ was against the weight of the evidence, because there was no controversy as to the amount of the damages occasioned by the defective work; that inasmuch as the jury allowed about $18.00 of the ~~appellant's~~ defendant's claim, they must necessarily have done so because they considered, that ~~appellant~~ defendant had proved his case against ~~appellee~~ plaintiff, so far as defective work was concerned, and there being no dispute about $37.45 being the amount of damages the jury, according to the proof, should have allowed that sum in full.

It appeared from the evidence, that the work which ~~appellee~~ plaintiff had to do with reference to the articles manufactured for the Fox Machine Co., was to drill and ream a hole in a certain part of bushings; and the proof tended to show, that the hole drilled in some of the bushings was larger than the specifications of the Fox Machine Co. called for; and too large for the use the Machine Co. desired to make of the bushings; and they were therefore returned ~~to appellant~~ defendant by the machine Co., and a credit was allowed the Machine Co. for the sum of $37.75.

The record however does not sustain the contention of appellant, that the proof of the amount of damage suffered by appellant is clear and undisputed. There was ~~found in the record~~ that the cost of the materials and labor on the manufactured articles returned to ~~appellant~~ defendant, was $37.45; but this alone cannot be considered, in fixing the measure of damages, inasmuch as the appellant has become repossessed of the manufactured articles.

[illegible] of damages be sufficiently against the weight of the evidence; and secondly, that the court erred in giving the first instruction requested by the defendant.

Appellant urges, that the jury in their verdict, allowed only about one half of the amount of damages claimed in recompense, and that the verdict in this respect, is against the weight of the evidence, because there was no controversy as to the amount of the damages sustained by the plaintiffs; that inasmuch as the jury allowed about one half of the plaintiff's claim, they must necessarily have, in arriving at their verdict, duly considered, that defendant had proved his plea, either partially, so far as intoxicated work was concerned, or else on a simple show [illegible] the injury, according to the proof, should have allowed that in full.

It appears from the evidence, that the work which defendant had to do with reference to the building belonging to the Fox Machine Co., was [illegible] a small part of building; and the evidence, that the work utilized in more of the building was in the specifications of the Fox Machine Co. [illegible] large for the use the machine Co. [illegible] building; who they were [illegible] the machine Co., [illegible] for the use of it, &c.

The court [illegible] by the [illegible] by [illegible] to [illegible] that the work of the defendant in [illegible] manufactured articles [illegible] the [illegible] of [illegible], [illegible] the [illegible]

~~Ralph Brown, plaintiff's~~ Defendant's superintendent, the only witness who testified concerning the value of the manufactured articles returned, said, that the only value which the articles returned would have for sale, would be for junk; but he also said that he did not know how much in dollars and cents, the value of the articles would be for this purpose. There was no proof that the articles might or might not have any value for any other purpose.

The matter of what the value of the articles returned to appellant, and retained by it, had in dollars and cents, was a necessary factor inestimating correctly the amount of damages appellant was entitled to; and in that state of uncertainty in the proof in that regard, the jury necessarily were left to conjecture concerning this feature of the case; and this court is in the same predicament. We cannot say, therefore, that the jury did not arrive at a proper conclusion concerning the matter of the damages; and clearly would not be justified in disturbing the verdict of the jury on that account.

Concerning the other error assigned, appellant claims, that appellee's first instruction, in the standard of comparison stated in the instruction, omits the element "of machine men who are engaged in that particular kind of work"; and there is force in the objection made concerning this defect in the instruction; but it is equally clear, that the jury were not misled by this error, concerning the questions which they determined; and it is manifest also, that the error could not have had any effect on the verdict of the jury, concerning the question of the amount of damages to be assessed in the matter of appellant's recoupment. So the error was harmless, and the judgment should not be reversed on that account.

There being no reversible error in the record, the judgment should be affirmed. Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

62

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fifth day of October, in the year of our Lord one thousand nine hundred and fifteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 466

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 10 1916

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6249.

Benjamin Lounsberry, appellant.

vs Appeal from DuPage.

George Boger, Exor. appellee.

Nibaus, P.J.

In this action a writ of replevin was sued out in the circuit court of DuPage County by the appellant Benjamin Lounsberry, against the appellee, George Boger, as Executor of the estate of Albert Smart, deceased, to recover the possession of a promissory note for the principal sum of $1,000, which appellant claimed, was donated to him by the deceased, Albert Smart, prior to his death; and which the Executor was wrongfully withholding from him. A demand had been made on the executor for the note in question, prior to the commencement of the suit; and the Executor refused to give up the note, on the ground that it was a part of the assets belonging to the estate of Albert Smart deceased.

The declaration ~~is~~ was in the usual form in cases of replevin but a count in trover was added. The ~~appellee~~ defendant, pleaded not guilty, non ~~detinet~~ cepit, non ~~detinet~~ detinet, and also pleaded a special plea, alleging property of the note in the ~~appellee~~ defendant, as Executor of the estate of Albert Smart, deceased. On the trial of the case by the court, the ~~appellee~~ defendant was found not guilty; and the court rendered judgment in conformity with this finding, and for costs, against the ~~defendant~~ plaintiff. ~~The appellant brings the case to this court on appeal, to reverse the judgment rendered.~~

The note claimed by ~~appellant~~ the, was one assigned and taken in his life time, from the makers, W. H. Herring, William Bryce, H. W. Martin, G. W. Heartt, and Joseph Batterham. It was dated December 12, 1905, payable in one year after the date, and bearing interest at six per cent per annum;

Geo. E. Cole.

[illegible]

[illegible]

George Boyer, Exor. appellee.

[illegible], J.

In this action a suit of replevin was sent out in the circuit court of Douglas County by the appellant Lumberbery, against the appellee, George Boyer, as Executor of the estate of Albert Cassel, deceased, to recover the possession of a promissory note for the principal sum of $[illegible], which appellant claimed, was owned by the deceased, Albert Cassel, prior to his death; and that the Executor was wrongfully withholding from him, a demand was made on the executor for the note in question, prior to the commencement of the suit; and the Executor refused to give up the note, on the ground that it was a part of the assets belonging to the estate of Albert Cassel deceased.

The defendant in the court from a judgment of replevin but a verdict in favor his client. The [illegible] contrary, [illegible] of the [illegible] plea, alleging property of the note in the [illegible], as Executor of the estate of Albert Cassel, deceased. On the trial of the case by the court, the [illegible] liability and the court rendered judgment in conformity with this finding, and for costs, against the [illegible] appellant; [illegible] to reverse.

The [illegible] Lumber in his life time, from [illegible], [illegible] Lumber Co., [illegible] Griffin, [illegible] [illegible] in [illegible] 1902. [illegible]

and it is not conceded, that unless the note by gift causa mortis passed to the ~~appellant~~ plaintiff, it was a part of the assets of the estate of Albert Smart, deceased.

The deceased, Albert Smartz, was a bachelor, who, at the time of his death, and for a number of years prior thereto had lived on his farm, which was located in DuPage County. Sarah Lounsberry, a cousin of the deceased, was his housekeeper. ~~The appellant~~ Plaintiff, who was a brother of Sarah Lounsberry, had also worked for the deceased a number of years, as a farm hand, and was so employed at the time of the death of the deceased. The deceased kept the note in question, with other notes, and valuable papers, which he owned, his will and some of his money, in a tin box, which he kept locked, in a secretary, or desk, in his bed room, and the keys for the locks on the secretary and the tin box, were on a ring, which the deceased was in the habit of carrying in his trousers pockets, During his sickness, the keys were kept in the same place.

Two days after the death of the deceased, his two brothers with two other men, came to the house of the deceased, to take charge of his effects. They found the tin box ~~located~~ locked in the secretary, and the keys to open it, were on the key ring as usual, in the pocket of the trousers of the deceased, in the bed room, and when the box was opened, the note in question was found among its contents, which consisted of valuable papers, other notes owned by the deceased, together with money in his pocketbook, and his last will. The tin box and contents were taken possession of, by the brothers, and then subsequently turned over to ~~appellant~~ defendant, as Executor of the estate.

The legal questions involved in the case are practically the same as those passed upon by this court, in the case of Lounsberry vs Boger, Executor, in 195 Ill. App. 38. . In

and it is conceded, that unless the note by gift causa mortis passed to the respondent, it was a part of the assets of the estate of Albert Martin, deceased.

The deceased, Albert Martin, was a bachelor, etc., at the time of his death, and for a number of years prior thereto had lived on his farm, which was located in [illegible] County. Frank Lounsberry, a cousin of the deceased, was his housekeeper. The respondent who was a brother of Frank Lounsberry, had also worked for the deceased a number of years, and was so employed at the time of the death of the deceased. The deceased kept the note in question, with other notes, and valuable papers, which he owned, his will and some of his money, in a tin box, which he kept locked, in a secretary, or desk, in his bed room; and the keys for the locks on the secretary and the tin box, were on a ring, which the deceased was in the habit of carrying in his trousers pockets; during his sickness, the keys were kept in the same place.

Two days after the death of the deceased, his two brothers, with two other men, came to the house of the deceased, to take charge of his effects. They found the tin box locked in the secretary, and the keys to open it, were on the key ring as usual, in the pocket of the trousers of the deceased, in the bed room; and when the box was opened, the note in question was found among its contents, which consisted of valuable papers, other notes owned by the deceased, and also with money in his pocketbook, and his last will. The box and contents were taken possession of, by the brothers, and were subsequently turned over to the administrator of the estate.

The legal questions [illegible]

the same as those [illegible]

Lounsberry vs [illegible]

that case, notes similar to the one in controversy here and similarly endorsed, were claimed by Sarah Lounsberry, as a gift from the deceased causa mortis. This court held in that case, that the gift was incomplete because of the lack of delivery of the notes claimed, in the life time of the deceased.

The indorsement on the note in question, when found in the tin box, by the brothers of the deceased, was as follows: "If this note is not paid until my death, pay to Benjamin Lounsberry. (Signed) Albert Smart". This indorsement clearly indicates, that it was the intention of the deceased, to have the title to the note pass to the appellant, after his death. However, appellant in this case seeks to establish a delivery of the gift in question by the testimony of Sarah Lounsberry. She testified, that about a week prior to the death of Albert Smart, he requested her to call the appellant, Benjamin Lounsberry, to the sick room, which she did; and that when the appellant came, the deceased said to him, in her presence: "Ben, I don't think I will live many days; and now I will give you a thousand dollars; and I want you to use it towards the purchase of a home; and I will leave it with Sarah; and she will give it to you after the funeral;" and that afterwards he gave her the keys to the tin box, containing the note and other property of the deceased, saying, "This is yours now; keep the secretary locked, and after I am taken out lock the room, and let no one enter the room." She says, that she then kept the keys in her pocket, and put the tin box back into the secretary, and locked the secretary; that the deceased did not ask for the keys again, nor have them after that time; that she kept the keys in her possession; but unlocked the secretary to take out things for him, now and then, when he wanted them;

that The tin box was not unlocked after that time; but that just before the brothers of the deceased came to take charge

[illegible] case, notes similar to the one in controversy here [illegible] similarly endorsed. [illegible] a gift from the deceased causa mortis. This court [illegible] case, that the gift was incomplete because of the weak [illegible] ility of the notes alleged. [illegible]

The instrument on the back of the notes (see page [illegible]) was in fact, by the brothers of the deceased, and in evidence. "If this note is not paid until my death, my [illegible] property." (Signed) [illegible]

Appellants, that it was the intention of the deceased, [illegible] the title to the note pass to the [illegible] the last. However, reliance in this case seems to be placed [illegible] delivery of the gift in question by the testimony of Frank [illegible] witness, that about a week prior to the death of Albert [illegible] he requested her to call the defendant, [illegible] secretary, to the sick room, which she did, and [illegible] came, the deceased said to him, in her presence: "Sam, I don't think I will live many days; and now I [illegible] you a thousand dollars; and I want you to use it [illegible] purchase of a home; and I will leave it with [illegible] will give it to you after we [illegible]." And then [illegible] he gave her the keys to the tin box, containing the note and other property of the deceased, saying, "This is [illegible] keep the secretary locked, and [illegible] the room. And let no one enter the room." [illegible] then kept the keys in her pocket, and put the tin box back into the secretary. [illegible] the deceased did not ask or [illegible] after that time; that he [illegible] but unlocked the secretary to take out [illegible] and then, [illegible]

[illegible] tin box was not [illegible]

of the effects of the deceased, she dropped the keys back into the trousers pocket of the deceased, where they found them.

Assuming this testimony of Sarah Lounsberry to be true, it is apparent, that if the deceased intended that the appellant should have the immediate possession and ownership of the note, he would have passed it over to appellant at the time he told him he would give it to him; and inasmuch, as he did not do so, it tends to show that he did not intend that appellant should have the note at that time. The direction that Sarah Lounsberry was to deliver the note to the appellant after the funeral, also excludes the inference that the deceased intended the appellant should have it before death.

Moreover the direction given merely emphasizes, what was already expressed by the endorsement on the note itself. The note was not separated from the other articles of property in the tin box belonging to the deceased; there was no real change made in the custody of the property in the tin box; and it is evident, that everything in the tin box, as well as the tin box itself, remained under the dominion and control of the deceased, until his death.

To make a valid gift <u>causa mortis</u> the owner must not only part with the possession, but all control and dominion over the property. (Barnum v Reed, 136 Ill. 382.) The statement made by the deceased, to appellant, and to Sarah Lounsberry, concerning the gift, was not accompanied by a real change in his dominion or control of the note during his life time; nor did it have the effect of transferring the ownership of the note during his life.

In this case, as in the case of Sarah Lounsberry, the gift of the note was incomplete, because it did not pass out of the dominion or control of the deceased, in his life time;

of the effects of the deceased, a ring of his key took into the trousers pocket of the deceased, there they found the.

Assuming this testimony of Sarah Lowberry to be true, it is apparent, that if the deceased intended that the appellant should have the immediate possession and ownership of the note, he would have passed it over to appellant at the time he told him he would give it to him; but instead, instead of so doing, it tends to show that he did not intend that the appellant should have the note as that time. The testimony tends that Sarah Lowberry was to deliver the note to the appellant after the funeral, and excludes the inference that the deceased intended the appellant should have it during his lifetime.

Moreover the direction given verbally emphatically, as already expressed by the delivery on the note itself. The note was not separated from the other articles of property in the tin box belonging to the deceased; there was no transfer made in the ownership of the property in the tin box, and it is evident, that everything in the tin box, as well as the tin box itself, remained under the dominion and control of the deceased, until his death.

To make a valid gift causa mortis the donor must by only part with the possession, but all control and dominion over the property. (Bertram v Beal, 108 Ill. 626.) The attempt made by the deceased, to appellant, and to Sarah Lowberry, concerning the gift, was not accompanied by any real change in his dominion or control over the property during his lifetime; nor was it made in the nature of a testamentary disposition, the uncertain of the date

In this case, as in [illegible] of the note are inconsistent [illegible] the donation of [illegible]

and the intention of the donor is clear, that he did not wish the title of the note to pass to the donee until after his death. It was therefore an attempt to make a disposition of his property, to take effect after death, which is testamentary in its character, and not valid, because the requirements of the Statute concerning such a disposition of property are not complied with.

We are of opinion that the trial court properly found the appellee not guilty; and that the propositions of law and fact held by the trial court, are not inconsistent with this general finding; that, therefore, no error was committed, and the judgment should be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6202

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

200 I.A. 467

BE IT REMEMBERED, that afterwards, to-wit: on AUG 10 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6352

General Accident Fire & Life

Assurance Corp. Ltd.

vs Appeal from Peoria.

Sophia Krekel, appellee

Niehaus, P. J.

This is an appeal from a judgment for $345 of the County Court of Peoria County recovered bythe appellee, Sophia E. Krekel, against the appellant, General Accident Fire & Life Assurance Corp. Ltd. The claim for which the judgment was rendered, ~~is~~ was based on an accident policy issued by the ~~appellant~~ defendant to John K. Krekel, for the benefit of his widow, the ~~appellee~~ plaintiff, insuring him in the sum of $300 against the effects of bodily injuries caused directly, solely and independently of all other causes, by external and accidental means; excepting however, suicide, while sane or insane.

John K. Krekel, the insured, was a saloon keeper in the city of Peoria, and lived with his family, in the rooms connected with and situated in the rear of the saloon, and in the second story above it. The policy in question, was issued to him on the 24th. day of November 1914; and insured him until the first day of January 1915. The policy provided that the insurance should be extended from month to month after the date mentioned, by payment of the premiums due for each month, on the first day of each month, in advance.

On the 24th. day of February, 1915, the deceased arose at about 5:30 in the morning, dressed and went downstairs, taking with him his revolver, which had been placed on the dresser the evening before. He descended one flight of stairs, which landed him in a little hall containing three doors, - one opening into his saloon, one into the kitchen, and the other into the lining room; he then went into the saloon

Sup. Ct. 6432

General Accident Fire & Life

Assurance Corp. Ltd.

vs Appeal from Peoria.

Sophia Krekel, appellee

Ill. Rep. p. 3.

This is an appeal from a judgment for $800 of the County Court of Peoria County recovered by the appellee, Sophia E. Krekel, against the appellant, General Accident Fire & Life Assurance Corp. Ltd. The claim for which the suit was prosecuted, was based on an accident policy issued by the appellant to John K. Krekel, for the benefit of his widow, the appellee, insuring him in the sum of $800 against the effects of bodily injuries caused by external, violent and accidental means; excepting however, suicide, while sane or insane.

John K. Krekel, the insured, was a saloon keeper in the city of Peoria, and lived with his family, in the rooms connected with and situated in the rear of the saloon, in the second story above it. The policy in question, was issued to him on the 24th. day of November 1892; and issued his until the first day of January 1893. The policy provided that the insurance should be extended from month to month after the date mentioned, by payment of the premium, on the each month, on the first day o each month, in advance.

On the 24th. day of February, 1893, the deceased at about 5:30 in the morning, dressed and went downstairs, taking with him his revolver, which had been placed in his dressed the evening before. He descended the flight of stairs, which landed him in a little hall connecting two rooms, - one opening into his saloon, one into the kitchen, and the other into the dining room and into the saloon.

and from there into the basement, where he stired up the fire in the furnace.

Both his wife and his motherinlaw testified that they heard the deceased descending to the basement; and his wife testified that she heard him come out of the basement, and heard his footsteps as he walked around in the saloon below; and while he was in the saloon, she heard a souffle on the floor, and, in connection therewith, the report of two gun shots in rapid succession. When she and her mother rushed downstairs they found the insured lying with his body parallel with and about two feet from the bar, his revolver lying about opposite his hips, and midway between his right hand and his body. The bullet wound had penetrated the left breast; and another bullet hole was discovered on the inside of the side door leading to the outside of the building, which they discovered was open, or partly open. A chair had also been overturned in the saloon. The revolver contained the shells of two exploded cartridges; and showed the indentattion of the hammer upon two others, which apparently had failed to explode.

A declaration was filed, declaring specially upon the policy involved in the suit, together with an affidavit of ~~appellee's~~ plaintiffs claim. The abstract however, does not set out the allegations of the declaration. To this declaration the appellant filed a plea of the general issue, with an affidavit of merits to the whole of ~~appellee's~~ plaintiffs demand, because the insured committed suicide; and that the policy was thereby invalidated.

There was a trial by jury, which resulted in a verdict; but the verdict is not set out in the abstract. An examination of the record, however, discloses the fact, that the verdict was for the appellee, and that it assessed

and from there into the basement, where he stirred up the fire in the furnace.

Both his wife and his motherinlaw testify that they heard the increased issuing to the basement, at his wife testified that she heard him come out of the basement, and heard his footsteps as he walked around in the saloon below while he was in the saloon, she heard a noise as on the floor, said to connection therewith, the report of the gun which in rapid succession. When she and her mother rushed immediately found the injured lying with his body partial with and about two feet from the door, his repeater lying close to his hips, and midway between his right hand and the body. The bullet wound had penetrated the left breast and so far by left hole was discovered on the inside of the door leading to a certain of the building, which they discovered was open, or partly open. A chair had also been overturned in the saloon. The revolver resembled the shells of two exploded cartridges and showed the discharge of the barrel upon the floors, which apparently had failed to explode.

A motorcation was filed, declaring specially upon the policy involved in the suit, together with an affidavit of ~~[illegible]~~ claim. The obstract however, does not set out the allegations of the declaration. To this declaration the appellant filed a plea of the general issue, with an affidavit of merits in the shape of ~~[illegible]~~ insured, ~~[illegible]~~ the insured committed suicide; and that the policy was thereby invalidated.

There was a trial by jury, which resulted in a verdict; but the verdict issue set out in the abstract. In consideration of the record, however, disclosed the fact that the verdict was for the appellee, and that it necessary

the appellee's damages at $345; and the court rendered judgment for such amount, which is the judgment, from which this appeal is prosecuted. Inasmuch as the allegations of the declaration, which were covered by the general issue, are not set out in the abstract, questions pertaining to the issue by those allegations raised by the general issue, are not before us for consideration; nor are there any questions pertaining to the verdict, in connection with the special interrogatories submitted to the jury, by the appellant, before us for consideration; as the verdict is not set out in the abstract. From the pleadings set out in the abstract, it is apparent however that the issue, which was tried and submitted to the jury was, that of the alleged suicide of the insured; and it is not important, which side had the burden of proof upon the issues presented, inasmuch as there was no contest over the facts, and all the evidence which was adduced in the case, was offered by the appellee.

The only question to be considered, is whether the evidence tends to show, that the injuries which were inflicted upon the insured, and from which he died, were the result of suicide, or were accidental. There is no direct evidence of how the insured was shot ; as to whether he shot himself with suicidal intent; or whether he was accidentally shot, perhaps in a scuffle with an intruder into his place of business, is and must necessarily be, a matter of inference from the facts and circumstances proven. We are of opinion, that the jury were justified in the conclusion which they evidently reached, that the insured did not commit suicide; at any rate, there was sufficient evidence to justify this conclusion as a reasonable conclusion.

Appellant also assigns for error. that there was no proof of the notice to appellant, of the death of the insured as required by the terms of the policy; nor any proofs of

the appellee's damages at $[illegible]; and the court rendered judgment for such amount, which is the judgment from which this appeal is prosecuted. Treasured as the formations of the isolation, which were covered by the general issue, are not put out in the abstract, questions pertaining to the issues by those affirmations raised by the general issue, are not before us for consideration; nor are those any questions pertaining to the verdict, in connection with the special interrogatories submitted to the jury, by the appellant, before us for consideration; as the verdict is not set out in the abstract. Prior to the execution of the contract, it is admitted that the insured, [illegible] was sried and submitted to the jury was, that of the alleged suicide of the insured; and it is not important, which also that the burden of proof upon the issues presented, insured as there was no contest over the facts, and all the evidence which was adduced in the case, was offered by the appellee.

The only question to be considered, is whether the evidence tends to show, that the injuries which were inflicted upon the insured, and from which he died, were the result of suicide, or were accidental. There is no direct evidence of the insured was shot ; as to whether he shot himself with suicidal intent; or whether he was accidentally shot, during a in a scuffle with an intruder into his place of business. It will must necessarily be, a matter of inference from the facts and circumstances proven. We are of opinion, that the jury were justified in the conclusion which they evidently reached, that the insured did not commit suicide; for, there was sufficient evidence to justify such conclusion as a reasonable conclusion.

Appellant also assigns for error. that there was no proof of the notice to appellant, of the death of the insured

the death of the insured, delivered to the appellant. It is sufficient to say on this point, that the record shows, that the appellant waived formal proof of these matters, on the trial; and is therefore not in position to raise questions concerning this proof, on appeal.

It is evident however, that the amount recovered by the appellee, in the judgment, - namely, $345 is in excess of the amount that the appellee had a right to recover by the terms of the policy; which is limited to $300; unless the proof shows, that the insured maintained the policy in continuous force after its date, by the payment of the premiums on the date due; in which case, appellee would also be entitled to recover five per cent of the $300 provided for in case of death, and for each consecutive month immediately preceding the date of the accident. It will be observed, that two elements are necessary to establish the appellee's right to recover the five per cent. mentioned; first, the maintaining of the policy in force continuously; and secondly the payment of the monthly premium on the date when it became due, which was the first day of each month, in advance. The insured paid for two consecutive months after the issuance of the policy, and thereby maintained the policy in force continuously; but he did not make his payment on the dates when they were due, the first payment having been made on the 7th. of January, and the second payment on the 2nd. of February; both payments being made after the date, when they had become due. Undoubtedly, the purpose of this stipulation to pay the additional five per cent, was to insure the prompt payment of the premiums on the dates they became due. The insured not having paid the same as required, appellee is not entitled to this additional five percent; but her right to recover was limited to the original amount of $300.

the death of the insured, delivered to the Insurance. It is sufficient to say on this point, that the insurer claims that the applicant waived formal proof of these statements, on the trial; and is therefore not in position to raise questions concerning this proof, on appeal.

It is evident however, that the amount recovered by the appellee, in the judgment, - namely, $322 is in excess of the amount that the appellee had a right to recover by the terms of the policy; which is limited to $300; unless the proof shows, that the insured maintained the policy in continuous force after its date, by the payment of the premiums on the date due; in which case, appellee would also be entitled to recover five per cent of the $300 provided for in case of death; and for each consecutive month intervening preceding the date of the accident. It will be observed, that two elements are necessary to establish the complainant's right to recover the five per cent. Conclusively first, the maintaining of the policy in force continuously; and second, the payment of the monthly premium on the date when it became due, which was the first day of each month, in advance. The insured paid for two consecutive months after the issuance of the policy, and thereby maintained the policy in force continuously; but he did not make his payment on the first when they were due, the first payment having been made on the 7th. of January, and the second payment on the 11th. of February; both payments being made after the date, on which they had become due. Undoubtedly, the purpose of this stipulation to pay the additional five per cent, was to insure the prompt payment of the premiums on the dates they became due. The insured not having paid the same on the first, appellee is not entitled to this additional five percent; but her right to recover was limited to the original amount of

The judgment xx therefore is erroneous to the extent of the excess over $300. This, however, can be cured by entering a remittitur; and the judgment is affirmed at cost of appellee upon condition that the appellee enter a remittitur, reducing the amount of the judgment to $300, within 5 days. But if a remittitur is not entered, the case is to be reversed and remanded.

Affirmed, on condition of the entry of a remittitur of part of the judgment.

Appellee having entered a remittitur reducing the amount of the judgment to Three Hundred ($300.) Dollars the judgment is affirmed in the sum of $300. at the costs of appellee.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6254

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 469

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 1 0 1916

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6254

The People of the State of Illinois
ex rel. Iceleen Wilson appellee.

vs Appeal from Knox.

Fred Cutler, appellant.

Niehaus, P. J.

This is an appeal from a judgment of the County Court of Knox County convicting the appellant, Fred Cutler, of bastardy on the complaint made by the prosecuting witness, Iceleen Wilson,

The only evidence offered by the prosecution to sustain the charge is the testimony of the complainant, and her testimony consists merely of the bare statement, that she ~~is~~ was an unmarried woman, the mother of the child in question; coupled with an assertion, that she had intercourse with appellant; and, that he ~~is~~ was the father of her child. No circumstances are related, that in any way corroborate the complaining witness in these statements; she does not state when the appellant had intercourse with her, nor where, nor under what circumstances; nor whether there was one act of intercourse, or more. The ordinary incidents of time, and place, which are indispensible connected with the main fact to be proven; and are usually regarded as necessary elements in fully establisging the fact of paternity, are entirely omitted from her testimony.

The bare assertions of the complainant, that appellant had intercourse with her, and was the father of her child were met, not only by the flat denial of the appellant, that he had any intercourse with the complaining witness; and that he was the father of herchild; but also by other evidence adduced on the part of the defendant, which militates strongly against the charge of paternity, as made against appellant.

Cir. Ct. 2004

The People of the State of Illinois

ex rel. / appellee.

vs. Appeal from Ther.

Fred Oulie, (appellant).

Brown, J. :

This is an appeal from a judgment of the County Court of Cass County, convicting the appellant, Fred Oulie, of [illegible] in the commission of the misdemeanor [illegible] Italian Vision.

The only evidence offered by the prosecution to sustain the charge is the testimony of the complainant, and the testimony consists merely of the bare statement, that one [illegible] an unmarried woman, the mother of the child in question, coupled with an assertion, that [illegible] had intercourse with appellant; and, that he is the father of the child. No circumstances are related, that in any way corroborate the complaining witness in these statements; no [illegible] that when the appellant had intercourse with her, nor there, nor under that circumstances; not [illegible] of intercourse, or more. The testimony [illegible] and place, which are indispensable [illegible] first to be proven; and as usually [illegible] elements in fully establishing the [illegible], or entirely omitted from the testimony.

The bare assertions of the complainant, that [illegible] had intercourse with her, [illegible] were met, not only by the flat denial of the [illegible] that he had any intercourse with the complainant [illegible] that he was the father of her child; but also by other witnesses [illegible] on the part of the defendant, which utterly [illegible] the charge of paternity, as [illegible].

Miss.Clara Snapp, testified, that the general reputation of the complaining witness is bad in the community where she lives; and that from that reputation she would not believe her under oath. This witness also testified, that while she remembered but one person by name, who had discussed the reputation of the complaining witness, she also remembered other people talking about the matter, whose names she could not recall at that time.

Mrs. Lucy South testified, that the complaining witness while pregnant with the child in question, [illegible] repeated occasions, that one Claude Keffer was the father of the child.

And the brother of the appellant, Ernest Cutler, testified that on various occasions, and during the time when conception must have taken place, he had sexual intercourse with the complainant.

All this evidence is in strong contradiction of the general statement of the complaining witness, that the appellant is the father of her child; and goes as well to impeach her credibility.

In a case of this kind, it is encumbent on the prosecution to establish the charge of bastardy by the weight of the evidence. Mattes v The People etc. 158 Ill. App. 77.

The weight of the evidence in this case, however, clearly favored the appellant. A verdict in a bastardy case, that is against the weight of theevidence, should be set aside. McCoy v The People etc. 85 Ill. 441.

The language of the supreme court in the case of Jones v The People etc. 53 Ill. 386, applies with peculiar aptness to the case at bar: "In this case the putative father testifies, he never had sexual intercourse with the complainant; and, that he is not the father of the child; other witnesses who are not impeached, and seem to be of unquestioned credibility, testify to facts contradictory to those stated by her;

Miss Clara Sharp, testified, that the general reputa-tion of the prosecuting witness in the [illegible] where she lives; and that from that reputation she would not believe her under oath. This witness also testified, that [illegible] she remembered [illegible] discussed the reputation of the prosecuting witness [illegible] [illegible] willing [illegible] [illegible].

Mrs. Lucy Todd testified [illegible] with [illegible] [illegible].

And the [illegible] of the [illegible], that on various occasions, [illegible] tion must have taken place, [illegible] complained.

All this evidence is [illegible] uncontradicted [illegible] general statement of the prosecuting witness, that [illegible] appel-lant is the father of her child; [illegible] or credibility.

In a case of this kind, [illegible] tion to establish the [illegible] of [illegible], [illegible] of the evidence. Foster v The People, [illegible].

The weight of the evidence in this case, [illegible] avored the appellant, [illegible] against the weight of the evidence, [illegible].

McCoy v The People [illegible].

The language of the supreme court in [illegible] v The People [illegible] to the case at bar: "In this case the prosecutrix [illegible] tes-tifies, he never had sexual intercourse with [illegible]; [illegible] that he is not the father of the child; [illegible] [illegible]

and, while she is not corroborated in any important partiular by any witness, we think the verdict should have been for the defendant. The case should go to another jury, and that it may, this judgment is reversed and the cause remanded."

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on AUG 10 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No.6356

Michael J. Ryan appellee

vs. Appeal from Stark.

John E. Harty, appellant.

Niehaus, P. J.

~~This was an~~ action of assumpsit, ~~commenced~~ by Michael J. Ryan, ~~the appellee~~ plaintiff, in ~~the circuit court~~ of Stark County against John E. Harty, ~~the appellant~~ defendant. The declaration in the case consists of the common counts to which the appellant filed the general issue. The appellee set forth in his bill of particulars, filed with the declaration, that the appellant owed him $1106. This indebtedness ~~is~~ was composed of two items, namely, $906, which ~~appellee~~ plaintiff claimed the father of ~~appellant~~ defendant owed him, and which ~~appellant~~ defendant had assumed, and also an item of $200 cash loaned to ~~the appellant~~ defendant; ~~and appellee~~ plaintiff testified that ~~appellant~~ defendant executed a promissory note for the sum of $1106 payable to ~~appellee~~ plaintiff, but retained it with the consent of ~~appellee~~ plaintiff. ~~Appellant~~ defendant did not deny the assumption of the $906 indebtedness, nor the $200 item, for money loaned him by the ~~appellee~~ plaintiff; but denied, that he ever executed a note for the same, and claimed, that he had paid both items to ~~appellee~~ plaintiff.

There was a trial by jury, and a verdict for appellee, and his damages were assessed at $1100. After overruling a motion for a new trial, made by appellant, the court rendered judgment on the verdict; from which judgment this appeal is prosecuted.

There is practically but one question raised on this appeal. It is contended by the appellant, that the appellee was bound to prove his case by a preponderance of the evidence; and that there is no such preponderance; that concerning the transactions out of which the claim of the

[illegible]

Eliseus J. Ryan appellee

[illegible]

John E. Hardy, [illegible]

Minnesota, [illegible].

This was an action of assumpsit, commenced by [illegible] E. Ryan, the assignee, [illegible] against John E. Hardy, the defendant. The declaration in the case consists of the common counts to which [illegible] that filed the general issue. The [illegible] also filed a bill of particulars, filed with the declaration, [illegible] defendant owed him $1100; $92 in indebtedness [illegible] items, namely, $900, which [illegible] claimed the defendant [illegible] owed him, and which [illegible] and warrants, and also an item of $300 cash loaned to [illegible]. [illegible] testified that [illegible] account [illegible] for a sum of $1100 payable to [illegible], but [illegible] with the consent of [illegible]. [illegible] assumption of the $900 indebtedness, nor the $300 item, [illegible] loaned him by the [illegible]; but [illegible] accounted a note for the same, and claimed, that [illegible] which issued to [illegible].

There was a trial by jury, [illegible] for [illegible]. His damages were assessed at $1100. After over[illegible] for a new trial, made by [illegible], [illegible] judgment on the verdict; from which judgment the [illegible] is prosecuted.

There is practically but one [illegible] appeal. It is contended by [illegible], [illegible] was found to prove his case by [illegible] testimony; and that there is no [illegible] [illegible]

appellee arose, and upon which the appellant's defense is based, there are but two witnesses, -- namely, the appellee on the one side, and the appellant on the other; that appellee in sustaining his case, testified to the existence of facts constituting his case, and there is a direct denial of these facts by the appellant; and that hence, this leaves appellee's case without a preponderance of evidence to support it.

While it is true, that the statements made by these parties respectively, concerning the matters in issue between them, are diametrically opposite, there were facts and circumstances testified to by other witnesses, which apparently contradicted the parties respectively, in some parts of their testimony; there was also some evidence which may be considered as corrobative of their testimony in some particulars.

But the number of witnesses who testify in a case, is not necessarily decisive of the question of preponderance. If there are but two witnesses, and they testify diametrically opposite, concerning matters within their personal knowledge this does not necessarily result in a lack of preponderance concerning the matters; the question of preponderance is largely a question of the credibility of the witnesses who testify; and a question for the jury. The jury are the proper judges to determine which witnesses are more credible, or which of the parties to a law suit is telling the truth. (Shaw v The People 81 Ill. 150; Boylston v Bain, 90 Ill. 383; Johnson v The People 40 Ill. App. 382; affirmed in 140 Ill. 350.)

It is distinctly emphasized in Boylston v Bain, supra that when a fact essential to a recovery, is sworn to by one witness, and denied by another, of apparently equal credibility it does not necessarily follow, that there is no preponderance of evidence; but in that case, there is a conflict of evidence

[illegible] arose, and upon this [illegible]
based, there are but two witnesses, — namely, [illegible]
on the one side, and the [illegible] on the other; [illegible]
in sustaining his case, testified to [illegible]
constituting his case, and there is no material [illegible]
facts by the appellant; and [illegible] leaves [illegible]
case without a preponderance on [illegible] to sustain it.

While it is true, that the testimony is on their [illegible]
respectively, concerning the matters in issue before the [illegible],
are diametrically opposite, there were many [illegible] circumstances [illegible]
testified to by other witnesses, which apparently corroborate [illegible]
the parties respectively, in some parts of their testimony;
there was also some evidence which may be considered [illegible]
corroborative of [illegible] witnesses.

But the number of witnesses who testify in a case, is
not necessarily decisive of the question of preponderance.
If there are but two witnesses, and they testify diametrically
opposite, concerning matters upon which their personal knowledge
this does not necessarily result in a [illegible] of evidence
concerning the matters; the question of preponderance is
largely a question of the credibility of the witnesses [illegible]
testify; and a question for the jury. The jury are the
proper judges to determine which witnesses [illegible]
or which of the parties to a law suit is entitled [illegible]
(Shaw v The People 63 Ill. 180; Boylston v [illegible], 82 [illegible]
182; Johnson v The People 96 Ill. 213; [illegible] 111 Ill. 320.)

It is distinctly [illegible] in Dunham v [illegible]
that when [illegible] witnesses, and [illegible]
it does not [illegible]
of [illegible]

which it is the peculiar province of the jury to settle; and it is for the jury to determine where the weight of the evidence lies, under those circumstances; and having determined the question, courts of review should not disturb their verdict. In this case, the jury, who saw the witnesses and heard them testify, were in the best position to determine where the truth lay; and this court cannot say that the jury were wrong in the conclusion which they formed.

It is also urged by appellant, that inasmuch as the verdict was for $1000 and the appellee's claim was for $1106, it is apparently a so-called compromise verdict, and the court should have set it aside for that reason. We are of the opinion that the appellant is not in position to object to the verdict, because it is not for as much as the appellee claimed; and that there was no error in refusing to set aside the verdict, for that reason.

The record does not disclose any legal ground for reversing the judgment in this case; and it should therefore be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6277

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

200 I.A. 471

BE IT REMEMBERED, that afterwards, to-wit: on AUG 10 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. no. 6277.

Robbs Express Company,
Appellee,

-vs-

Nickolas Fenkel,
Appellant.

Appeal from County Court of Rock Island County.

Michaus, P. J.

The appellee, Robbs Express Company, commenced suit in assumpsit in the county court of Rock Island County against the appellant, Nickolas Fenkel, to recover $654.00 which it is claimed is due from the appellant on account of collections made by him for appellee. The declaration filed by the appellee consisted of the common counts, and an itemized statement of the account sued on is attached thereto showing the total amount of collections of $654.82 claimed.

To this declaration the appellant filed a plea in the nature of a plea in abatement, which the appellant verified by affidavit. This plea avers that the demands in the declaration arose out of partnership transactions; that the appellant, and one Edward A. Lewis, acting and doing business by the name and style of Robbs Express Company, and in its behalf, entered into a verbal agreement with the appellant to conduct the business of hauling freight to and from the several railroad depots in the city of Rock Island, and that the collections made by him were for hauling done under the terms of this verbal agreement, and that Lewis also made collections under this agreement for which he had never accounted to the appellant, and that Lewis had failed and refused to make such accounting, and that the rights and obligations of the parties with reference to the matters alleged in the

declaration could only be ascertained by a court of equity.

The appellant, by leave of court, amended his plea in abatement and filed the general issue, and a notice of set-off, which was afterwards amended. In the amended notice of set-off the appellant admits the collection of the $654.83 set out in the account attached to the decl ration but avers that by virtue of the verbal agreement entered into by him with the Hobbs Express Company he is entitled to one-half of the amount collected and that he is also entitled to one-half of certain collections made by the Express company for hauling certain wares and merchandise from their depots and warehouses to and from the Rock Island Arsenal, and that under the verbal contract collections made in conformity therewith by the Express company it is indebted to him in the sum of $[illegible].

There was a trial by jury and at the conclusion of all the evidence in the case the court, on motion of appellee, directed the jury to return a verdict for the plaintiff and assess its damages at $654.83, which was accordingly done. The appellant thereupon made a motion to set aside the verdict and for a new trial, which motion was overruled, and the court thereupon entered judgment in favor of the appellee for the amount found in the verdict, from which judgment this appeal is prosecuted.

The principal error assigned, and one which embraces all the questions for determination on this appeal, is that the court erred in directing the verdict, and that the court should have submitted to the jury the question as to whether or not the appellant had a verbal contract with the appellee, as alleged in his plea in set-off.

It appears from the evidence that the [illegible] in the general express business in the city [illegible], and that the appellant is a teamster owning [illegible] team and doing the work of a teamster. It is [illegible] 1, 1910, the appellant entered into a written [illegible] as a teamster concerning the hauling which [illegible] to do in the course of its business to and from the government arsenal [illegible] is located near the city of Rock [illegible]. This contract is [illegible]:-

" July 1, 1910.

" AGREEMENT entered into this day between [illegible] Company and Nick Nerkel, whereby the Robb's Express Company has agreed to employ Nick Nerkel as teamster on the basis of Twenty-one [illegible] per week, he to furnish his own team and [illegible] stood he is to do what hauling we have to and from the [illegible] Arsenal exclusively. Where it is impossible [illegible] one team we will furnish the help on days [illegible] heavy. This contract to go into effect July [illegible], [illegible] July 1, 1911.

signed [illegible]

Accepted
Nick Nerkel."

The ~~appellant~~ defendant contends that this written [illegible] the hauling which the plaintiff [illegible] the Government, of Government owned materials and supplies, [illegible] on the day on which this written [illegible] was entered into, and before its final execution, [illegible] oral and distinct agreement with M. P. Dennis, [illegible] of the Express company, concerning which Nick [illegible] to and from the arsenal by him, [illegible] by which the parties were to share equally in the profits of such work [illegible]

~~the verbal agreement [illegible] shipments — raw material, [illegible] the stuff [illegible] between the two of [illegible] — raw material that [illegible] from different shippers and factories, and stuff that would come from the Government as rejected and we would [illegible] rejected stuff; these shippers were private corporations and individuals."~~

And ~~[illegible]~~ that in his judgment the written contract was signed after the verbal understanding mentioned. B

Concerning the hauling which the appellant was to do under the terms of the written contract the contract itself would be the best evidence, and its terms in that regard could not be varied or changed by verbal testimony or conversation. It is well settled that a written contract unambiguous in its terms cannot be varied, contradicted or modified by parol evidence of anything that occurred at or prior to the time when such written contract was executed. (Schneider v Sulzer, 212 Ill. 87)

The terms of the written contract did not limit the hauling to be done by appellant to government owned materials and supplies but included all the hauling the Express company had to do to and from the Rock Island Arsenal exclusively.

The appellant's alleged verbal agreement cannot be considered as having the effect of modifying or changing the terms of the written instrument in qualifying and limiting the amount or kind of hauling which was to be done under its terms to and from the Arsenal; and inasmuch as it clearly appears that this alleged verbal agreement or understanding was contemporaneous with the making of the written contract and before its final execution, such verbal agreement

[illegible] instrument. As the supreme court announced in Grub v Miller, 246 Ill. 463, " A written contract was entered into between the parties in which they set down what had been agreed upon between them. In an action on the contract it is presumed to have contained the whole of the agreement and the various conversations relating to the subject matter were merged in the written contract." This is the well settled doctrine of law in this state. (Graham v Sevlion, 165 Ill. 95; Town of Kane v Farrelly, 192 id. 521; Bellunide Power and Transmission Co. v Crane Co., 208 id. 214; Schneider v Sulzer, supra.)

While it appears entirely improbable that the appellant would enter into a verbal understanding concerning the hauling of merchandise and material , with the appellee , different from the written contract in regard to the same matter and under consideration at the same time, yet assuming that the conversations testified to by the appellant with Lewis, the president of the Express company, did actually occur, they must be considered as merged and included in the written contract; nor can they be considered as in any way varying the terms or legal effect of such written contract. The only contract, therefore, that could be considered as bearing upon the issues in this case was the written contract. The court properly held that the alleged verbal agreement did not sustain appellant's claim of set-off, and that he had not established any legal right or claim to the money collected; having admitted that he collected the amount stated in appellee's declaration and account, the court properly directed a verdict for this amount.

The judgment should be affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6145

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

200 I.A. 476

BE IT REMEMBERED, that afterwards, to-wit: on AUG 10 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6146

William C. Siegert, appellee

vs Appeal from LaSalle.

Public Service Company of Northern Illinois, a Corporation and the City of Ottawa. appellants/

Carnes, J.

This is an appeal from a judgment of $3500 for the plaintiff in a suit prosecuted by William C. Siegert, the appellee, against the City of Ottawa, and Public Service Company of Northern Illinois, a corporation to recover for injuries sustained by appellee by reason of an alleged unsafe condition of a bridge on a public street of the city.

The Illinois river bridge is 943 feet long, with a driveway 24 feet wide, and was on July 8, 1914, the day in question the only means of crossing the Illinois river in the city of Ottawa. There was a large amount of travel across the bridge including interurban and street car traffic. There was laid along the east side of the wagon road of the bridge extending into the driveway about eighteen inches from the side of the bridge an eight inch gas pipe used by defendant Public Service Company, laid in sections joined by a flange or expansion joint projecting two inches, so that the diameter of the pipe and flange was about twelve inches. This pipe was elevated a few inches above the level of the floor of the bridge on a cement foundation, but ~~xxxxxxxx~~ extended beyond the base on which it rested. It was not covered or guarded in any way and the flange or expansion [illegible] constructed that a wheel scraping along the side of the pipe would catch on the flange. Plaintiff [illegible] acquainted with and accustomed to the use of this bridge. He

drove onto it with a horse that was somewhat afraid of cars and met a street car. His horse shied to the east as the car passed him, and just then another car came up. The horse becoming more frightened veered to the east and started to run. The left wheel of the wagon struck against the gas pipe a few feet from a flange. The wheel slid along until it hit the projection of the flange. The wagon was thrown into the air by the force of the impact and appellee thrown out and injured.

~~We find no substantial error prejudicial to the appellants in the giving or refusing of instructions. No error in passing on the introduction of evidence is suggested. Appellee suggests error in giving instructions for appellants, but as no cross error is filed that question is not before us.~~

The court instructed the jury, at the instance of appellants except as modified by the insertion of the clause in parenthesis, as follows:- "That while it is the duty of a city to use reasonable care to keep its streets in a reasonably safe condition to drive upon, it has the right to devote the sides of the street to other useful public purposes. It may construct sidewalks of a higher grade and gutters of a lower grade than the driveway, place curbing on the line of the gutters, erect hydrants and authorize the erection of hitching posts, telephone, telegraph and electric light poles and the laying of water and gas pipes (provided that in so doing the streets remain in a reasonably safe condition for public use.) It may thus to a reasonable extent and for a useful public purpose narrow the driveway and exclude teams and horses altogether from the sides of the streets." B

Appellants object to the modification. We think the instruc-

drove onto it with a horse [illegible]
care and [illegible] a street car. [illegible]
[illegible]
horse becoming more frightened [illegible]
to run. The left wheel of the wagon struck [illegible]
pipe a few feet from a flange. [illegible]
[illegible] the projection of the flange. [illegible]
into the air [illegible]
[illegible] injured.

~~[illegible] of instructions. No error in [illegible] on the introduction of evidence is suggested, [illegible] error in giving instructions [illegible]~~

The court instructed the jury, at the instance of appellants except as modified by the insertion of the clause in parenthesis, as follows:- "That while it is the duty of [illegible] city to use reasonable care to keep its streets in reasonably safe condition to drive upon, it has the right to use the sides of the street to other useful public purposes. It may construct sidewalks of a higher grade or parkways of a lower grade than the driveway, place curbing on the sides of the gutters, erect hydrants and authorize the erection of hitching posts, [illegible] [illegible] [illegible] public use.) [illegible] for a useful purpose [illegible] include [illegible] horses [illegible] streets."

Appellants object [illegible]

tion as modified, is a fair statement of the law applicable to the case. It does not mean as appellants argue, that there is an imperative duty on the city to keep its streets in a reasonably safe condition for public use that is not answered by exercising reasonable care in that matter, but it does mean that a city is not as a rule justified in devoting the sides of the streets to public purposes that will render the streets unsafe for public use. The question in this case is similar to that in Brennan v City of Streator, 168 Ill. App. 134 affirmed by the supreme court in 256 Ill. 468 As said by the supreme court - "The question arises in each case whether the obstruction is of such a character that the passenger using the street or the sidewalk in the ordinary way and using ordinary care for his own safety is exposed to an unnecessary and unreasonable risk."

This is a question for the jury unless the circumstances are such that but one reasonable answer can be made. In the present case we regard the circumstances such that reasonable minds might differ in answering the question, therefore it could not properly be withdrawn from the jury by a directed verdict. Yet the trial court was charged on the motion for a new trial with a duty to determine whether the verdict was manifestly against the weight of the evidence, and we are required to review the judgment of the trial court in refusing to grant a new trial on that ground. The majority of the court are of the opinion that the evidence does not support an affirmative answer to the question as stated by the supreme court above quoted, and that the ends of justice require the submission of the facts to another jury.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on AUG 1 0 191 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6246.

M. L. McCloud,

Appellee,

-vs- Appeal from Iroquois.

M. H. Hogle and
Frank A. Gilbreath,

Appellants.

CARTER, J.

M. L. McCloud, the appellee, sued M. H. Hogle, the appellant, and one Frank A. Gilbreath, in an action on the case for fraud and deceit in the representation of title to a tract of land. There was a jury trial and a verdict of not guilty directed as to Gilbreath, and verdict and judgment against appellant for $854.87, from which judgment this appeal is taken.

A The facts disclosed by the evidence were substantially as follows:- [illegible] The plaintiff was a dealer in [illegible] and Hogle [illegible] fore May 7, 1910, owned one hundred twenty acres of land in Iroquois County, Illinois, subject to a first mortgage [illegible] of [illegible]. On [illegible] he gave a second mortgage on the land to one [illegible] to secure an indebtedness said to have grown out of [illegible] transactions. There being default in payment of the first mortgage [illegible] the equity of redemption in proceedings in the chancery court

Issaquena County. The record of that court shows that on December 6, 1911, there was a finding " That publication has been duly made in the manner and form and for the time required by law", and Gilbreath and his wife, the defendants in the suit, were defaulted and the bill taken as confessed against them. The next day a decree of sale was entered barring the defendants' equity of redemption upon the making of the sale. The sale was made pursuant to the order in the decree to Sam Kinney for $500. which was approved by the court July 17, 1912. More than a year [illegible], January, 1913, Hogle [illegible] plaintiff Gilbreath's supposed equity in this land for an automobile valued at $1650. stating positively that the title to the land was in Gilbreath [illegible] only [illegible] first. A bargain was made and Hogle signed a memorandum in writing in which he agreed to furnish a deed of conveyance from the owner of the land to plaintiff and to clear the land [illegible] encumbrance and pay $650. in cash for the automobile. plaintiff inquired about the value of the land and the amount [illegible] first [illegible] mortgage, which he learned was $861.05. Hogle [illegible] procured Gilbreath [illegible] money [illegible] deed to plaintiff subject only to the [illegible] first mortgage, and gave plaintiff his check covering the $650. cash payment and the $861.05 necessary to pay and discharge the mortgage, and took the automobile. Plaintiff [illegible] the mortgage and [illegible] release with his deed to Issaquena County for record and did not discover for several months afterwards that he had no title to the land. Hogle had traded Gilbreath an old automobile for his supposed equity of redemption, and said he had no knowledge of a second mortgage and that he procured the deed direct from Gilbreath and wife to McCloud to save a recording fee, and for no other purpose;

that he supposed there was no other encumbrance on the land, though Gilbreath had before told him there was a judgment against him down there in Mississippi but it was for a gambling debt and was not good; that he did not tell plaintiff about the judgment because he did not consider it valid; he always understood a gambling judgment was not good, and that Gilbreath had told him there was no service on him; and he took Gilbreath's word that the judgment was invalid.

John P. Pallissard, a lawyer who was representing Gilbreath in the trial of this case, was called by plaintiff as a witness and testified that he prepared the deed from Gilbreath [illegible] plaintiff Hogle [illegible], but [illegible] prior to that transaction Hogle had come to him to inquire about the land and said Gilbreath had suggested that he do so. Pallissard at the time knew something about the title and knew about the Minney mortgage. He testified that he went into the title pretty thoroughly in his discussion with Hogle; that the Minney mortgage may not have been mentioned by name but it was mentioned that there was a second mortgage. Hogle denied this conversation and denied that he was ever informed by anybody before the deed was made that there was a second mortgage on the land. B

Whether appellant knew of a second mortgage depends upon the credit to be given to Pallissard's and appellant's testimony as to that matter. That he knew there was a second encumbrance, valid or invalid, appears from his own testimony, and there is no question that he told appellee there was no encumbrance other than the railroad mortgage. The jury were warranted in believing

Ballissard instead of appellant if in their judgment he was more worthy of belief, and appellant can hardly be excused for stating that there was no second encumbrance when he had notice that there was a judgment based on a gambling debt on the ground that he supposed, as matter of law, such a judgment would be void. It therefore follows that appellant made a material statement to appellee as to the title of the land that he knew was false or had no good reason to believe it to be true. It is immaterial that appellee believed the representation and acted on it, and was induced thereby to trade for the land. Under the circumstances we do not think appellee should be charged with negligence in acting on that statement. Therefore appellant became liable to appellee in an action for fraud and deceit, and if there is no substantial error of law in the record the verdict and judgment was properly rendered against him.

Appellant objected to the testimony of Ballissard on the ground that he was an attorney acting for Gilbreath in the case; also on the ground that he was employed by Hogle to draft the deed from Gilbreath and wife to appellee and whatever was there said was privileged. The law is well settled that while it is unethical and bad practice for a lawyer to act as both attorney and witness in the same case, still he is not disqualified as a witness. As to the other objection Ballissard testified to nothing that occurred at the time he drafted the deed that had any bearing on the question of appellant's prior knowledge of the title. It is therefore unnecessary to discuss the question whether he was disqualified from testifying to a conversation that occurred at that time. His evidence as to appellant's knowledge of the second mortgage related to a time when it is not claimed he was

[illegible] appellee's [illegible]. We conclude that his [illegible] on, so far as [illegible], was properly sustained.

C [illegible] Neither error in [illegible]'s [illegible] [illegible] of the [illegible], the [illegible] [illegible] decree, foreclosing the [illegible], and [illegible] made by the commissioner [illegible] to be [illegible] decree. It was objected in the court below to the authenticated copy of the mortgage that it was "Not properly certified and incomplete and immaterial . The attestations are not full enough." The trouble pointed out here is that the certificate of the clerk recites that he is ex-officio recorder and the certificate of the judge fails to recite that the clerk is also recorder. We are inclined to the opinion that the objection sufficiently pointed out that defect and that it was error to admit the record of the mortgage. The objection to the authenticated record of the deed made by the commissioner to Finney was " For the reason that there is no law of the state of Mississippi in evidence showing that the courts of that state had the power to appoint a commissioner to make sale of this land, nor any law of the state offered in evidence showing that the proceedings under this exhibit are according to the statute of that state, or that the court had jurisdiction of the officers and the subjectmatter to proceed as therein stated." This objection did not point out the defect here complained of and we are of the opinion that the court did not err in admitting that record over that objection. The authenticated copy of the record of the foreclosure proceedings was objected to on the ground that it did not show personal service on the defendants and that there is no evidence showing that the laws of the State of Mississippi are, or that service could be

had upon the defendants by publication as therein shown; that there is no evidence under the laws of the State of Mississippi showing that the court had jurisdiction of the defendants or of the subject matter. There was no objection to the regularity of the certificates. Appellant's argument here is that there being no evidence of the laws of Mississippi the presumption is that they are the same as the laws of Illinois, and that the decree is bad in not reciting an affidavit supporting a publication and in not showing that summons was issued and returned "Not found".

The attack on the decree is collateral. The rule is quite different in cases of direct attack. (15 A & E Ency. 999) A foreign judgment rendered in a civil [illegible] in another jurisdiction although it is not founded on personal service. (ib) " Where the copy of a record of a sister state judgment [illegible] judgment was a county, district or circuit court with a presiding judge, a clerk and a seal, and therefore a court of record, it may be presumed that the court was one of general jurisdiction." (ib.997) "A presumption of jurisdiction obtains where a court of general jurisdiction proceeds to litigate a cause, unless there is a showing in the record that there was no jurisdiction." (Forrest v Ney, 218 Ill. 165) In pleading a foreign judgment of a court of general jurisdiction it is not necessary to set out the facts or laws conferring jurisdiction which will be presumed and [illegible]. (25 Cyc.1552) In an action on a judgment recovered in another state, it will be presumed that the court had jurisdiction of the subject matter and the parties in the absence of proof to the contrary, although the record may be incomplete or ambiguous on this point. (25 Cyc. 1577; Vanfleter v Sankey, 148 Ill. 556; Rosenthal

v Renick, 44 Ill. 202) In an action of debt on a judgment of another state by a court of general jurisdiction, the record being silent as to service of process, the judgment is prima facie evidence of jurisdiction. "Nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so." (Dunbar v Hollowell, 34 Ill. 168) See also, (Gundry v Hancock, 147 Ill.App. 49, 52) Where it is sought to prove the contents or existence of a judgment of a sister state an authenticated copy of the judgment itself is admissible in evidence, and sufficient. (Chamberlain v Britton, 136 Ill.App. 290; affirmed in 231 Ill. 246) A judgment in rem by a court of competent jurisdiction in one state cannot be collaterally assailed in another. (23 Cyc. 1591) Where a judgment has been obtained there is a strong legal presumption that the court had jurisdiction and that it proceeded conformably to the laws of the state in which it was rendered. (Welch v Sykes, 3 Gilman 197; Bimeler v Dawson, 4 Scammon, 536; Norton v Critchfield, 18 Ill. 153; Dixon's Ins. Co. v Thompson, 155 Ill. 204) It is true if the record disclosed want of jurisdiction the judgment would be treated as a nullity, but we conclude, under the authority of the above cited cases, that the recital in the record that there was due service by publication cannot at least be taken as showing a want of service, and that in a collateral attack it is not necessary that the record should show either the laws of Mississippi as to service by publication or that every individual step was taken that [illegible]

[illegible]

-12-

the time in question.

It is objected that under the instructions of the court the value of the automobile was taken as the measure of damages, and not the value of the Mississippi land. We think there is no error in this respect. Appellee parted with his automobile. There is no question about its value. That part of the consideration resting on the Mississippi land entirely failed. In an action on contract where the vendor receives nothing for his property because of failure of the vendee to deliver the agreed property in exchange, he is entitled to recover the value of his goods.(Beeler v Wolf, 195 Ill. 565) If appellee had received any title to the land and had lost through the fraud and deceit of appellant a portion of the value that he should have received, then the proper inquiry would have been as to the value of the land and what part of it he lost. The rule in covenant is that for a total breach of the covenant of seizen, or good right to convey, where nothing passes by the conveyance, the measure of damages is the amount of consideration paid and interest. (Horne v Walton, 117 Ill. 130, 135, citing 2 Sunderland on Damages, 257, and Kramer v Supervisors of Peoria County, 74 Ill. 282) It is indicated in that case (Horne v Walton) that the same rule applies in action for fraud and deceit.

Appellant's objections to the instructions are covered by what we have already said. If the judgment must rest on the testimony of Tullissard contradicted by that of appellant as to appellant's knowledge of the second contract, we still are not inclined to disturb the verdict of the jury based on Tullissard's testimony. It appears that Gilbreath was insolvent. Appellant undertook to convey the title to this land to appellee clear of all [illegible] by the method that he himself selected. If in

only simple justice if he did not know of the encumbrance that he should make good is undertaking. But in bringing the action in this form appellee undertook the burden of proving fraud and deceit. The jury found a verdict in his favor on that issue. The trial court approved it, and we see no good reason for disturbing it. Finding no substantial error in the record the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

620

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

200 I.A. 527

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 10 1916

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8294.

Fred Pierce, appellee

vs Appeal from LaSalle

Village of North Utica, appellant.

Carnes, J.

Appellee Fred Pierce, claims to have been employed by the appellant village to aid in the quarantine of one Cyrus Young afflicted with small pox and confined to a house in said village. He ~~and~~ sued appellant before a justice of the peace for thirty four days(service at $3.00 a day, $102.00 the contract rpice, and had judgment there for that amount. The village appealed to the circuit court where he had judgment on a verdict for the same amount. The village prosecutes this appeal and asks a reversal on the ground that the court erred in refusing a peremptory instruction for the defendant, and that the verdict is against the law and the evidence. There is no criticism in its brief and argument on any ruling in the introductionof evidence, or giving or refusing instructions except the peremptory instruction.

Appellant's theory of the law is that under our statutes cities and villages are liable for quarantine expenses, but in no event in a case of this kind could they become liable for the expense of nursing; that if Young had money or property to pay for his nursing it was for him to do so. If not, it was a county charge under the provisions of paragraph 24, chapter 107, Hurds Revised Statutes. The decision of this court in City of Spring Valley v County of Bureau, 115 Ill. App. 545 is cited with other cases in support of that position, which, without further discussion we will assume to be the law. Appellant says that the services performed by appellee were as nurse or attendant and were not such as the village was empowered to contract for; therefore

without controverting the evidence that appellee was employed by authorized officers of the village to perform the services at that price, it insists that there can be no recovery because of a want of authority of the village to make such a contract.

It appears that Young was sick with small pox in a house in the village; that the house was quarantined and ~~appellee put in charge of the patient.~~ A police officer brought food to ~~appellee~~ plaintiff and the patient. ~~He~~ The plaintiff took charge of the food and remained in the house making sure of the desired end that no one should be permitted to come in contact with the sick man. It seems to us that whatever terms were used in the employment of appellee by appellant that it meant that his services should secure a quarantine. An effective quarantine could not have been carried out without some one doing substantially what appellee did. While the facts of the case present a question of some difficulty we do not think the presumption from those facts that appellee was engaged and employed in a quarantine service is so manifestly against the weight of the evidence that we ought to disturb the verdict. The judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6298

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk
E. M. DAVIS, Sheriff.

200 I.A. 528

BE IT REMEMBERED, that afterwards, to-wit: on AUG 10 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

[illegible] . [illegible] .

Henry G. Heron,
Appellee,

-vs-

Illinois Central Railroad Company, and Peoria & Pekin Union Railway Company,
Appellants.

Appeal from [illegible] county.

[illegible], J.

Appellee, Henry G. Heron, sixty-five years of age, in Apr, 1916, was, and had been for many years, in the employ of the Peoria & Pekin Union Railway Company, one of the appellants, as a switchman. That company owned a yard with switch tracks in the vicinity of Manley City, Illinois. The Illinois Central Railroad Company, as lessee, operated certain interchange tracks. Appellee was thereon by [illegible] with the yard and was manning and operating trains therein. While he labored on the morning in question in the course of his employment, he was going to the coal house [illegible] on a [illegible] between tracks "D" and "E", in said yard. [illegible] was from one hundred to three hundred feet (as variously estimated by witnesses) from two to 1 [illegible] an Illinois Central freight train of twenty loaded cars [illegible] from the rear, running northward on track "E". Appellee had to cross that track to reach the coal house. [illegible] that the train stopped when the rear end of the [illegible] even with him; [illegible] semaphore about one hundred fifty feet north of the coal house was [illegible] a signal [illegible] train to stop, [illegible] suddenly [illegible] place in obedience to [illegible]; [illegible] was called to [illegible] track "D" about on this [illegible] train [illegible] to proceed [illegible] with between tracks "D" and "E"

log

engineer, fireman and brakeman of the train each testified that it did not stop at [illegible] place. Only the engineer and appellee testified to the contrary. He says that he [illegible] proper place in the cab keeping a lookout in front of the train on the right hand side; that the fireman and head brakeman were on the other side of the cab looking forward; that there was an automatic bell on the engine continuously ringing; that he [illegible] at [illegible] a collision walking between the tracks in a place of safety quite a distance ahead of the engine; that when the approaching engine was within a hundred thirty-five feet from appellee he suddenly stepped [illegible] in front of the train entered "[illegible]" without looking; that he immediately sounded the "[illegible] whistle" three or [illegible] times, heavy blasts and applied the brakes, but was unable to stop the train and appellee was struck by the step located on the left hand side of the pilot of the engine and thrown to the side of the track; that the engine and two cars passed by him before the train came to a stop. [illegible] corroborating and discrediting this testimony. The train was moving at six or eight miles an hour. Appellee's counsel say it is unreasonable to suppose that he attempted to cross thirty-five feet ahead of the engine moving at that speed and did not succeed in clearing the track. Defendants' counsel say it is unreasonable to suppose that the heavy train which was drawn by a [illegible] engine [illegible] again quick enough to enable appellee to be struck at the distance of seven feet. [illegible] seems to us [illegible]. [illegible] the three train [illegible] train stopped; therefore, [illegible]

one that it did not bring. If it did not, and the accident happened as stated by the engineer, we do not see any [illegible] for recovery. It was a question for the jury, and [illegible] one often permit of to stand, notwithstanding a greater number of witnesses have testified [illegible] than for a necessary allegation of fact. But often in such cases the surrounding circumstances shown by the evidence lead [illegible] to the testimony of the smaller number of witnesses and make it seem more reasonable to believe their statements than that of the larger number. We see nothing in the record outside of the direct testimony of the witnesses [illegible] and did not stop to make it more reasonable to presume [illegible] it did than that it did not. [illegible] of the opinion that [illegible] verdict is so manifestly against the weight [illegible] as to make it our duty to reverse the judgment [illegible] the ends of justice require that the evidence [illegible] submitted to another jury.

Appellants urge that the verdict is excessive. We regard it quite as large as could be sustained if the defendants had properly been found guilty, considering the age and earning capacity of [illegible], and the injury shown by the evidence.

Appellants allege that peremptory instruction [illegible] above on the evidence, which the court did not err in refusing. They also assigned other [illegible] instructions, [illegible] the court refused, [illegible] we have [illegible] on them. [illegible] instructions given, [illegible]

Obviously, except a slight modification in two of them, which is not considered of; the seven instructions offered by the plaintiff were given, of which no complaint is made. We think the seven requisite statements of law contained in the refused instructions were substantially covered by the instructions given.

A question is raised as to the form of the verdict, which we find not material as it will not occur on another trial. No objection is made to the ruling of the court in the introduction of evidence.

For the reasons above stated the judgment is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6312

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

2001A.529

BE IT REMEMBERED, that afterwards, to-wit: on AUG 10 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 3502.

FINLEY BARRELL, Appellant, -vs- LAKE FOREST WATER CO., Appellee.	Appeal from Lake.

CARTER, J.

[illegible] Bill [illegible] by Finley Barrell, ~~the appellant~~ complainant, against Lake Forest Water Co., a public service corporation, defendant, to restrain it from shutting off the water on complainant's premises because of his failure and refusal to pay a bill rendered for water furnished in the months of July, August, and September, 1913, alleged to greatly exceed the amount he had used in that period. There was a prior hearing on a motion to dissolve this same injunction in which the motion was allowed and appeal to this court by the water company. We reversed the order overruling the motion to dissolve and remanded the cause for another hearing on that motion. ~~The~~ The opinion ~~is~~ was reported (not in full) in 191 Ill. App. 269. We referred to the statutes governing the procedure on motions to dissolve an injunction, and said such motions should be heard and determined upon the weight of the testimony introduced by the respective parties at

the hearing; that the complainant introduced no evidence and in our opinion the material allegations of fact in the sworn bill were met and overborne by the answer under oath and affidavits read in support thereof by the defendant; that the record, as presented, indicated that the water meters were correct; and correctly read; and that statements of the complainant that he did not use so much water without any showing as to the basis of such statements were of little probative value. We suggested that the facts and circumstances as to the use of water on the premises might be shown; that there might have been a waste of water through the neglect of servants or some defect in the pipe, and that evidence negativing such a loss or waste should be offered before an injunction should be permitted to stand. In short, as the record then stood, there was little, if any, reliable ~~evidence~~ evidence as to the amount of water used except that furnished by reading of the meters and prima facie evidence that the meters were accurate.

It is suggested by counsel that we were understood to say that the case depended entirely upon evidence as to the mechanical condition of the meters, and that the injunction should be dissolved unless a test made on the meters themselves showed they were inaccurate. No such conclusion was intended. The suggestions in the opinion above noted indicate that we were then of the opinion that evidence other than of the mechanical construction and working of the meters might be furnished and should be furnished if the injunction was permitted to stand. On reinstatement of the

case other affidavits were read covering the suggestions found in the opinion and indicating a sharp controversy as to many material facts, ~~presenting a case where there should be a final hearing of the evidence with opportunity to cross examine the witnesses before determining the merits of the controversy.~~ The question before the trial court on this motion was whether the status quo should be maintained pending ~~that~~ a final hearing.

In Paxton v Fabry, --- Ill. App. ---, we reviewed and discussed the authorities on the duty of the chancellor on the hearing of a motion to grant or dissolve a temporary injunction. The statute provides for a hearing on such motion; and whether a temporary injunction should be granted, or, if granted, should remain in force depends upon evidence produced at that hearing. But, as we pointed out in that case, it is not a hearing on the merits, and whether the status quo shall be preserved by the granting or continuance of a temporary injunction depends not only upon the probability of the case made on such a hearing, but also upon the relative injury that might be sustained by the parties by the action of the chancellor in granting or refusing a temporary injunction contrary to what might be found on a final hearing to be the merits of the case.

In the present case the allegations of the bill and answer and affidavit evidence in support and denial thereof requiring a hearing on the merits and the preliminary

injunction only serving the purpose of maintaining the status quo pending the trial, it could not be said that little loss would be sustained by appellant in wrongfully maintaining the present condition compared with that which would be sustained by appellee in wrongfully cutting off his water supply during that period.

We are therefore of the opinion that the court erred in its order dissolving the injunction. That order is reversed.

Reversed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6262

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

200 I.A. 547

BE IT REMEMBERED, that afterwards, to-wit: on AUG 10 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6262.

J. E. Pickens,
Appellee,
-vs-
City of Kankakee,
Appellant.

Appeal from Kankakee,

DIBELL, J.

J.E.Pickens, fell into a hole in a public street in the city of Kankakee at about eleven o'clock at night on July 4, 1915, and struck his left knee and other parts of his left leg against a water pipe and a faucet thereon in said hole, and was injured thereby, and brought this suit against the city of Kankakee, the Kankakee Water Works, and Fred Horscher to recover damages for said injuries. Before the trial he dismissed the suit as to defendant, Kankakee Water Works, At the close of the trial a verdict was directed for the defendant, Horscher, There was a verdict against the city [illegible] thousand dollars. A motion for a new trial [illegible]. Plaintiff had judgment and the city prosecutes this appeal.

It ~~is~~ was contended that plaintiff ~~cannot~~ could not recover because the notices filed by him with the city clerk and with the city attorney did not contain the address of the attending physician, as ~~is~~ was required by the statute relating to such notices. In that respect the notices said: " That Dr. J.A.Guertin was the attending physician, and that he called in Dr. C. C. Smith to examine the injuries." It was proved that at the time

of the accident Dr. J. A. Guertin held the official position under the city of Kankakee of city physician and that there was no other Dr. J. A. Guertin in that city at that time. We conclude that under the principles laid down in McComb vs City of Chicago, 263 Ill. 510, the notices were sufficient in that respect. We must assume that the executive officers of the city knew the residence of the city physician, and by the exercise of reasonable diligence could ascertain any fact for which resort to the attending physician was necessary or important.

It is urged that certain opinions expressed by the witness, Dr. Greenman, were incompetent because they were based upon subjective symptoms. Dr.Guertin attended the plaintiff until he went away on his vacation, and he left directions with the plaintiff to go to Dr.Brown in his absence and the plaintiff did go to Dr.Brown, but he also went to Dr. Greenman for treatment; and Dr.Brown made a thorough examination and treated the patient, and the plaintiff then went to Dr.Greenman and was treated by him twelve or fourteen times thereafter. Opinions of a physician founded in part upon subjective symptoms, the knowledge of which is derived by the phydician during his treatment of the patient are competent. West Chicago St.R.R.Co., vs Carr, 170 Ill. 478; Greinke vs Chicago City Ry. Co., 221 Ill. 564 and cases therein cited. This suit had been begun before the plaintiff went to Dr.Greenman, and it is argued that it must be that he intended to call Dr. Greenman as a witness, and that in reality the examination must have been for the purpose of qualifying him as a witness.

The evidence is all to the contrary and [illegible] no support except in the fact that Dr. Greenman was called as a witness. It was natural that the different physicians attending the plaintiff should be called as witnesses. The witness was not disqualified from giving his opinion founded on subjective symptoms by the mere fact that after having treated the patient for some time he became a witness in his behalf.

The injury occurred under the following circumstances: There was in Kankakee a public park known as Electric Park in or near the southeasterly part of the city of Kankakee. It was reached by Osborn Avenue, a public street of said city. There were nine or ten thousand people at said park in the evening of July 4, 1915. The crowd started to leave the park to go back to the city at 10:40 p. m. The street car line entered Osborn Avenue at its south end and went north for some blocks, and thence by different directions to the center of the city. When the crowd reached the street car line it was found [illegible] the street cars was temporarily suspended for some reason not explained. Thereupon, some three or four thousand people started to walk back into the city, going north on Osborn Avenue. Plaintiff and his wife had spent the evening in the park and were among the walking back. The south end of Osborn Avenue was in an unfinished condition. There was no sidewalk on either side. The street car track was in the middle of the street, and there was a place traveled by teams east of the street car track, and east of that some grass, and east of that a place where the

sidewalk would ultimately be laid. There were also telephone poles and perhaps some other obstructions between the place where the vehicles traveled and the place where the sidewalk would be. Plaintiff and his wife traveled along the street car track. When they reached a place somewhere near the center of a block they saw on the east side of the street that there was a sidewalk from there north, and that some of the people traveling in the street had gone over to and were walking upon that sidewalk. Thereupon plaintiff and his wife turned and went towards the sidewalk for the purpose of getting out of the street car track and out of the place where the vehicles naturally went, and getting upon the sidewalk and over to the place for pedestrians. There was no curb and there was no parking in the ordinary sense of that term, but as they passed from the place where the wheeled vehicles had been, they went upon the grass on the same level until they had almost reached the sidewalk. There was in the ground, not far from the sidewalk, a hole three feet wide and from four to eighteen inches deep, according to the varying testimony of different witnesses; and up from the center of that hole came an iron pipe, and on the top of the pipe a few inches above the ordinary level of the ground was a faucet. Plaintiff fell into this hole and struck his knee against the iron pipe or faucet, and was seriously injured. Some witnesses placed this hole at one foot from the sidewalk, and others at two feet, but plaintiff testified that as he fell, he fell with his face on the sidewalk, ~~which indicates that he was correct in saying that it was close to the sidewalk.~~ This hole had been there for more than two months and a half in substantially the same condition, ~~so that the city must be presumed to have had notice~~

[illegible] have repaired it before the occasion. Plaintiff did not know of its existence, and the night was dark. The city contends that it was not bound to exercise reasonable care to keep that place in a reasonably safe condition for foot travelers, and that therefore the instructions which informed the jury of the duty of the city in relation to its streets were improper. Plaintiff and his wife turned to go upon the sidewalk from the center of the street soon after they had passed the south end of the sidewalk as actually laid, and we think that the city might reasonably expect that persons going along that street from the south would take the traveled way in the center of the street until they reached a place where there was a sidewalk, and would then turn to go upon the sidewalk; and that the jury might reasonably find that it was not a lack of ordinary care for the plaintiff to go where he did under the circumstances shown in the evidence. The instructions in regard to the duty of a city concerning its streets were stock [illegible] have been many times approved by the courts. [illegible] opinion that a cause of action was shown and [illegible] shown that had any tendency to defeat it.

[illegible]

of plaintiff was in a certain contracting business in Watseka. A branch of that business had been opened in Hawthorne, and plaintiff was in charge thereof, and apparently in a partnership with his father. He received certain wages per week, and [illegible] thereto fifty per cent of the profits made upon the Hawthorne

business, and he testified, and it was not disputed, that prior to this accident he was making $1800.00 per year. The injury produced an inflamation of the inner lining of the knee joint. He suffered great pain and much of the time was unable to use that knee as usually required in the active duties of his business. He was laid up for a certain length of time; had walked with a cane and was able to walk but little witout a cane. He has been able to figure on contracts but not to perform the active daily services for which he formerly had been paid; and since that time he has been able to make only $400. or $500. per year. ~~According to the evidence his loss of earnings within the [illegible] period exceeded the verdict.~~ He was likely to recover the complete use of the knee in time. The city brought proof tending to show that he had been seen riding a bicycle. He denied he had ridden a bicycle. The city offered witnesses who had seen him walk when they did not think he used a cane. He testified that on some of the occasions they named he did use a cane, and that he walked very little without a cane. The injuries he suffered were not merely to the knee but related to the whole of the [illegible]. loss of earnings, and his pain and suffering, [illegible] physicians and his other expenses for sickness to which he testified are considered, we are unable to say that the verdict is too large. It is true that the extent of plaintiff's injuries largely depends upon his own statement of the pain and suffering and of his inability to walk and to perform the ordinary duties of his calling because of thisinjury. It is

true that he may be misrepresenting the extent of his injuries to the jury, but they believed his testimony and the trial judge has approved it, and most of his statements as to his pain and suffering and the effects upon his employment are expressly testified to by him, and are not disputed by any other witness in the case. Under all these circumstances we cannot say that the judgment is excessive.

The court gave eight instructions for the plaintiff and we consider them to be substantially a correct statement of the law. The court gave sixteen instructions as offered by the defendant, and slightly modified and gave another instruction for defendant, and these instructions fully state the law favorable to defendant. The court refused eleven instructions requested by the defendant but so far as they were competent, they were embodied in the instructions given. Two or three of them were so involved that they might reasonably have been refused on that ground. We are of opinion that the jury were sufficiently and correctly instructed. Finding no reversible error in the record the judgment is therefore affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

6251

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

200 I.A. 553

BE IT REMEMBERED, that afterwards, to-wit: on AUG 10 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6381.

Jeannette E. Lewis, Admx. etc.

appellant.

vs Appeal from Co. Ct. Peoria.

New Amsterdam Casualty Company,

appellee.

Dibell, J.

~~This is a suit by the executrix of the last will of Thomas B. Lewis, deceased;~~ ~~upon a~~ a health and life insurance policy issued by ~~appellee~~ defendant to Thomas B. Lewis on June 29, 1914. Lewis was taken ill in August 1914, and died on March 16, 1915. ~~His wife became executrix and brought this suit as such.~~ The policy provided for sick benefits of $25 per week. No sick benefits were paid. There was an appropriate declaration upon the policy. Certain pleas were filed, to which a demurrer was sustained, and certain other pleas were then filed upon which issue was joined. The pleas were each in bar, except as to $19.72 tender made before suit. The first plea was the qualified general issue. The remaining pleas were that the application was made a part of the policy, and that the policy was issued upon the consideration of the premium and the statements in the application, and various statements in the application as to the good health of Lewis were denied. Special replications were filed to the special pleas, and issues were joined upon said replications, ~~and there was a trial by jury,~~ and at the close of all the evidence the court instructed the jury to return a verdict for defendant, and such verdict was returned, [illegible] for a new trial was denied, and there was a judgment [illegible] against the plaintiff, and the prosecutor sues [illegible] therefrom.

The parties lived in Peoria. George Reagan was [illegible]

~~appellee~~ defendant at Peoria, and this policy was issued from his office upon an application brought to him by C. K. Gerdes, who was also a life insurance agent. Lewis applied to Gerdes for health and life insurance, and Gerdes applied to Reagan. Apparently Gerdes prepared a first draft of an application and this application which was granted, was in fact written so far as the typewriter parts were concerned, (which were the ones that it was claimed were untrue), in Reagan's office and by his stenographer, by Reagan's direction, and delivered to Gerdes. It ~~is~~ was claimed that this application was fraudulent. ~~There is no proof of that except by inference.~~ Gerdes signed Lewis' name to the application. Lewis never saw it. Gerdes testified that he considered himself authorized to sign Lewis' name to it. Gerdes testified that he took the statements as to the condition of health of Lewis from applications which Lewis had made to him some years before. Gerdes denied any knowledge of the facts concerning Lewis' condition of health which tended to make this application untrue. The application was untrue, ~~and if made by Lewis or if made by Gerdes as his agent it would invalidate the policy.~~ ~~But~~ When plaintiff sought to show that Gerdes was in fact acting for ~~appellee~~ defendant and had frequently acted for ~~appellee~~ defendant before, the court sustained objections to the questions by which it was sought to prove the connection between Gerdes and ~~appellee~~ defendant. He was allowed to state that he had acted for ~~appellee~~ defendant before, but that answer was then excluded. ~~If Gerdes was agent for appellee and not for Lewis, then it is a serious question whether appellee would not be bound by this policy, unless, indeed, it appeared that Gerdes was engaged in an effort to defraud his principal, the appellee, and there is no evidence sufficient to warrant that conclusion.~~ We are of opinion that the court erred in refusing

~~to permit appellant to prove the relation which existed between Gerdes and appellee.~~ The proof showed that Gerdes did not receive any pay from Lewis for obtaining this insurance, but that Reagan was entitled to a certain commission as between him and ~~appellee~~ defendant, and that Reagan paid a part of that commission to Gerdes as his compensation for the work. ~~Appellee~~ Appellant introduced in evidence a letter from the superintendent of appellee to Lewis, dated February 1, 1915, notifying him that the company had cancelled this policy, and that they enclosed therewith their check for $68.15, in full of the premium which Lewis had paid and interest to that date, and also a registered return receipt admitting the receipt of this letter of February 1, which was signed "Thomas B. Lewis per G. C.Lewis." Objection was made to the competency of this evidence, and that objection was overruled. There was no proof who G.C. Lewis was, nor that he or she had any authority to sign the name of Thomas B. Lewis to that receipt nor that Thomas B. Lewis ever did receive that letter. This evidence was incompetent until the agency of G. C. Lewis had been established, or the fact that the letter did reach Thomas B. Lewis. By this improper testimony the record was made to show that the premium and interest thereon had been returned by appellee to Thomas B. Lewis. Inasmuch as appellee claimed to have returned the premium and the interest thereon, the plea of tender, by which it alleged that it had tendered $19.72 before the commencement of the suit, which tender it had kept good, shows that appellee was admitting some liability under this policy besides the liability to return the premium and interest thereon, and the nature of this obligation which is so admitted is not shown in the case. For the errors specified the judgment is reversed and the cause remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6292

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.

Hon. DUANE J. CARNES, Justice.

Hon. DORRANCE DIBELL, Justice.

200 I.A. 583

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 10 1916

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6295.

Dumont, Roberts & Company,
Appellee,
-vs- Appeal from Peoria.

Alfred L.McDougal, et al,
Appellants.

DIBELL, J.

On August 8, 1905, Alfred L. McDougal delivered his promissory note to Dumont, Roberts & Company, a corporation, for eleven thousand four hundred and sixty dollars, due one day after date, that being the amount then found due from him to them upon a settlement. He paid some interest. On November 9, 1907, to prevent the payee from at once suing the note, he executed to the payee an assignment of his interests in the estates of his mother and of his father, who were each then living. The estate of his mother is not involved here. By that instrument he assigned to the payee of the note " all interest which may hereafter accrue to me as heir, legatee or devisee of John McDougal." That instrument provided that if the note should not be paid at his father's death, it should then be paid " out of said interest which may accrue to me as heir, devisee or legatee of said John McDougal, my father." John McDougal died June 18, 1914, testate, making certain of his sons trustees and giving Alfred four species of property; certain real estate at once; a share of the personal property to be distributed by the executors after the payment of debts; a share in the income of certain real estate to be held in

trust till March 1,1915; and an interest in said last mentioned property in fee on March 1, 1915, if Alfred was still living. The debt was not paid, and on June 27, 1914, Dumont, Roberts & Company filed this bill against Alfred and against the executors and trustees to obtain the payment of the balance due on said note out of the interests so assigned. Alfred set up as a defense that the note was without consideration and that the assignment was obtained by duress. The cause was referred to the master to take and report the proofs and his conclusions. He found in favor of complainant. Defendants filed exceptions which were overruled. Thereupon, by leave of court, Alfred filed an amendment to his answer, in which he set up that between the time of the execution of said assignment and of his father's death, he filed a voluntary petition in bankruptcy and scheduled this debt, and complainant did not prove it against his estate, and he was discharged in bankruptcy, and that said assignment was defeated both by the discharge in bankruptcy and by the fact that the assignment was void because it was a contingent interest. It does not appear by the abstract that said cause was again sent to the master, but it is treated as if the [illegible] had been properly heard. There was a decree finding the amount due the complainant to be sixteen thousand three hundred and nineteen dollars and thirty-two cents, and directing the interests of Alfred in his father's estate to be sold to pay the debt. When the bill was filed not all the interests of Alfred had become fixed, but they had all accrued before the decree was rendered. Alfred and the executors and trustees appeal from said decree.

It is the settled law of this state that estates in expectancy may be assigned and that the assignment will be enforced in equity when it ceases to be an expectancy and becomes a vested interest. Donough v Garland, 269 Ill. 565; Cummings v Lohr, 246 Ill. 577; Bolin v Bolin, 245 Ill. 613; and many other cases. The fact that a will may make the expectancy contingent does not defeat this rule. Ridgeway v Underwood, 67 Ill. 419; Hudnall v Ham, 183 Ill. 486. Where the assignor of such an expectancy is afterwards adjudged a bankrupt, and is discharged, subsequent enforcement of the lien created by his assignment is not barred by his discharge in bankruptcy. He is not personally liable, but the lien which equity imposes upon the property so assigned is not barred by the discharge. Bridge v Kedon, 163 Cal. 493, 43 L.R.A.(N.S.) 404, and a note upon that subject in the last named report; Citizens Loan Association v B & M R.R. 196 Mass. 528, 82 N.E. 696; Mellin v Wenham, 209 Ill. 252; Wabash R.R.Co. v Meyer, 119 Ill. App. 104. In Pomeroy's Equity Jurisprudence this subject is fully discussed in Chapter 7, relating to Equitable Liens, and in Section 3 of Chapter 8, relating to the assignment of possibilities, expectancies and property to be acquired in the future. There are authorities in other states holding differently on this subject, but we regard Mellin v Wenham, supra, as decisive that the decree of the court below is in accordance with the law prevailing in this state.

The decree is therefore affirmed.

Michaus, P.J., took no part.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and sixteen, within and for the Second District of the State of Illinois:

Present--The Hon. JOHN M. NIEHAUS, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. DORRANCE DIBELL, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

200 I.A. 588

BE IT REMEMBERED, that afterwards, to-wit: on AUG 10 1916 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6305.

Charles M. Ferrell,
Administrator, etc.,
Appellee,

-vs- Appeal from Peoria.

Reuben Bruce,
Appellant.

FIBELL, J.

John Ferrell lived in Peoria and owned his home and the household furniture therein and other real estate, and held some certificates of deposit issued by the First National Bank of Peoria, and had these and other papers in a box in the safety deposit vaults of that bank. He had had several wives who had been divorced from him. He had four children, all grown, but was very seriously estranged from them. His last wife was not the mother of his children. When she procured her divorce from him in 1909, she resumed her former name of Marette. He had long and the intention that none of his children should receive any of his property. In 1912, when he was about eighty years old, he became seriously ill and feared that this would be his last illness. Mrs. Marette came to him, became his housekeeper, and took care of him till he died. He had formed the opinion that a will was much more likely to be contested and defeated than direct gifts in the lifetime of the donor. On September 11, 1912, he sent for friends, including a justice of the peace, and had a deed of the homestead prepared, conveying a life estate for her life to Mrs. Marette, with a remainder to Reuben Bruce as

trustee " to build an old man's home." In the deed Darnell reserved a life estate to himself. He executed that deed and delivered it to Mrs. Maratta. He caused to be prepared a deed to Reuben Bruce of other real estate owned by him, reserving a life estate in himself, and executed that deed and delivered it to Bruce. He caused a bill of sale of the household furniture from himself to Mrs. Maratta to be prepared, and reserved therein a life estate to himself, and executed that bill of sale and delivered it to Mrs. Maratta. He sent two of his friends to the bank to procure his box there, and sent with them an order directing the bank to deliver that box to them. When they reached the bank they did not have the key without which it could not be obtained. They went back and he gave them the key and they returned and brought the box to him. The certificates of deposit were taken out, and by his direction one of his friends began writing on the back assignments to Reuben Bruce and he began signing his name to those assignments. He was in bed, and when a paper was ready for him to sign he was propped up in bed with a book, placed on his knees upon which he did the signing. He became tired and only partly wrote his signature on the fifth certificate, of which certificates there were twenty-five in all. An attendant suggested that he leave the signing of the rest till another day, and he handed to Bruce the five which he had signed and told him with them to pay his funeral expenses and his debts and the rest should be his, and told the amount he wished paid on one debt, which he did not wish paid in full as he considered that the amount charged him was not just. He handed

property, his sole of

He

persons there present, to whom he had decided

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Deceased eight-days later.

was reversed by this court in Farrell v Bruce, 190 Ill. App. 309 for the reasons there stated. Upon a second trial the administrator had a verdict and a judgment for $2,119.80, from which Bruce prosecutes this appeal.

As incidental to the main controversy, appellant contends that this action cannot be maintained both because trover does not survive and because appellee cashed the certificates in the lifetime of John Farrell. We conclude that if appellant wrongfully obtained these certificates and converted them to his own use, trover would lie in the name of John Farrell, and that that action survives to his administrator under section one hundred and twenty-three of the Administration Act, which provides that actions for the conversion of personal property shall survive. The fact that appellee caused them to be cashed would not have defeated an action of trover by John Farrell, because it would only prove that appellee had converted them to his own use. Therefore, that fact would not defeat his administrator.

The proof is conclusive that John Farrell did assign these certificates in the manner described and deliver them to Bruce and that Bruce kept them. Their possession by Bruce was evidence tending to show that they had been duly and lawfully delivered to him and that he owned them. The authorities upon this subject were collected by us in O'Connor v Fossenna, 195 Ill. App. 1. Appellee's contention was and is that on the October 24th and 19th John Farrell was mentally incompetent to transact his business

of transferring these certificates to appellant. The burden of proof was upon appellee to show that condition. Hatch v Waters, 222 Ill. 26; Dickerhoof v Wood, 267 Ill. 50; The proof did show that John Ferrell was hateful, bitter towards his children and profane. There is no proof that he was acting under any insane delusion. The harshness of his sentiments and his profanity were not grounds for setting aside his disposition of his property. Snell v Weldon, 239 Ill.279. We must find in this record a very strong preponderance in the evidence that John Ferrell on September 14 and 19,1910, was in the full possession of his mental faculties, was entirely competent to transact the business in which he was then engaged, and was doing what he had long before planned to do-namely, to dispose of his property to the exclusion of his children. Probably the jury were actuated by a feeling that he ought not to have done this. But this was his property, and if he had sufficient mental capacity he had the legal right to give it to others than his children, Dickerhoof v , supra. And for aught that we can know he may have been justified in doing so. But whether he was justifiable or not is immaterial. Appellee contends that the verdicts of two juries for him should be conclusive upon us. The duty of appellate courts to set aside a verdict that is clearly against the weight of the evidence has been many times announced by our supreme court. (Chicago City Ry. Co.v Dee, 206 Ill. 174) Here the burden was upon appellee, and the clear preponderance of the evidence seems to us to be with

appellant. Appellant's witnesses did not state every detail of the transaction exactly alike. The testimony they gave on the citation in the probate court did not always correspond precisely with their testimony at this trial. Appellee argues from this that the whole story is untrue and was framed up by these witnesses to deprive the lawful heirs of their mother's estate. If there had been absolute harmony between the several witnesses and in the testimony of each at different occasions, it are urged, this would be much stronger evidence of collusion and a manufactured story. After all the criticisms upon this evidence are considered, we are of the opinion that it is still above that the preponderance of the evidence in with the appellant and that the verdict should have been for him. We conclude the issues should be submitted to another jury.

We find no reversible error in the instructions given at the request of appellee. The fifth instruction, given at the request of appellant, is defective because of an omission near its close. Some of the refused instructions are sufficiently embodied in those which were given. Several instructions, though otherwise correct, were improper because they omitted the vital question whether the deceased had sufficient mental capacity to transact the business in which he was then engaged. Other instructions were properly refused. The fifth instruction of appellant's instructions were proper. We find no reversible error in the rulings of the court upon the instructions on which error is assi-

signed.

For the reasons above stated the judgment is reversed and the cause remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

FILED

General Number 6000. October Term, A.D. 1911. Agenda Number 1

National Cash Register Company,

Defendant in Error,

-vs-

Ralph Jibben,

Plaintiff in Error.

Writ of Error to the Circuit Court of Tazewell County.

200 I.A. 600

MCCULLOCH, P.J.

Plaintiff in error sued out this writ of error from this Court to the Circuit Court of Tazewell County for the purpose of having a judgment in the latter court against him and in favor of defendant in error reversed.

Plaintiff in error has filed a plea in this cause in this court which avers, in substance, that the judgment in the circuit court was entered on the 22nd day of March, A.D. 1911, being one of the regular days of the February term A.D. 19[illegible] of that court; that said judgment was rendered in an action of replevin brought by defendant in error against the plaintiff in error; that the declaration also contained a count in trover and that the property sought to be replevied was not levied on under the writ of replevin; that said judgment was entered in favor of defendant in error and against plaintiff in error for the sum of $200.00 and costs of suit; that on the same day on which said judgment was entered plaintiff in error prayed and was granted an appeal to this court conditioned upon the plaintiff in error filing his appeal bond in the penal sum of $500.00 with surety to be approved by the clerk of said circuit court; said appeal bond, together with the bill of exceptions, to be filed in 30 days from the said 22nd day of March, 1911;

that an appeal bond was duly filed by plaintiff in error on the first day of April, 1911, and was on the same day approved by the clerk of said court; that defendant at the May term, A.D.1911, of this court, made its motion to have the judgment of the circuit court affirmed, together with damages, because said appeal had not been prosecuted nor an authenticated copy of the record filed in this court within the time required by law; that said judgment of said circuit court was, on the 17th day of June, A.D.1911, the same being one of the regular days of the May Term, A.D. 1911, of this court, affirmed by this court with 10 per cent. damages; that said May Term, A.D. 1911, adjourned to court in course on the 20th day of June, A.D. 1911; that no motion for rehearing was filed by the plaintiff in error in that appeal, nor was a certificate of importance prayed for by, nor allowed to, plaintiff in error, nor was leave given to take an appeal from said judgment of affirmance so entered by this court; that the 10 per cent., damages so assessed against plaintiff in error by this court, have been paid by him to defendant in error; that the pending petition for writ of error was not filed by the plaintiff in error until the 27th day of July, A.D. 1911, that said judgment of affirmance, so entered by this court at said May Term, A.D.1911, is still unreversed and in full force and effect.

To this plea plaintiff in error has filed his replication which avers, in substance, that the said supposed judgment of affirmance was and is the only judgment of affirmance that was ever entered at any time in said cause, and was not a judgment of affirmance upon the merits of said cause; that

None of the records, nor any part thereof, nor any transcript of the record, or any part thereof, nor any of the merits whatever of said cause in the circuit court was on file with, or presented to, or before this court in any manner or form at or before the time of said judgment of affirmance, and at no time prior to the 20th day of July, A.D. 1911; nor at any time prior to more than 20 days before the last day of the May Term, A.D.1911, of this court was there a record, as is required by law, on file in the office of the clerk of the Circuit court from which a true and complete transcript of the record in said above entitled cause could have been made, as required by law, to be filed in the office of the clerk of this court, or in any manner or form presented to this court, as required by law or by the rules of this court; nor was there any such record written up from the minutes or any other memorandum of either the trial judge or clerk of said circuit court and on file in the office of said circuit clerk, or at any other place at any time prior to the 20th day of July, A.D. 1911, and that the lack of said record of said cause and the transcript thereof was not brought about by the procurement, consent or connivance of either the plaintiff in error or his said attorney, nor any one else at his or their instance, and that none of the merits of said cause was ever at any time or place presented thereof to this court for consideration until the suing out of the present writ of error; that the said judgment of affirmance by this court was an affirmance for want of prosecution only and not upon the merits, and that there was never at any time prior thereto any opportunity to present said merits of the said cause to said court, etc.

To this replication the defendant in error has demurred. The judgment of affirmance of this court upon the appeal was that the judgment of said circuit court be affirmed in all things and stand in full force and effect notwithstanding the said matters and things therein assigned for error. There is no rule of law better settled than appeals and writs of error to review judgments cannot be prosecuted by piece meal, and that when an appeal or writ of error is prosecuted the judgment thereon is res adjudicata not only as to all the errors assigned, but as to all the errors that might have been assigned. (Baldwin vs Menecy, 204 Ill. 281) And this is true whether the judgment was affirmed upon the merits or for other reasons. "Nor can the effect of a judgment as res adjudicata "be affected by showing that though an appeal was attempted to "be taken the judgment was affirmed without considering the "cause on its merits, because of the absence of a sufficient "assignment of errors, or some other defect in the appellate "proceedings." I Freeman on Judgments, Sec. 249. This question was very ably considered in the case of Talley vs People, 122 Ill. App. 70. When the appeal bond was filed with the clerk of the circuit court and approved, the appeal in this cause was perfected and the circuit court lost all jurisdiction over the same. Judgment in this court on that appeal affirmed the judgment of the Circuit Court, and an anomalous situation would be presented to hold that this court, having once affirmed the judgment of the circuit court upon an appeal, can again review the same judgment and reverse it upon a writ of error. The judgment of affirmance of this court on the appeal Circuit court, and cannot be varied, explained or supposed to be a final judgment affirming the judgment of the court

contradicted by parole. W.ST.L.& P.RY.CO.vs Peterson, 115 Ill. 597. In the case of Salley vs People, Supra, it was held:- "The effect of this writ of error, if sustained, "would be to cause us to review the same judgment, which "upon the former appeal we affirmed and directed that it "should stand in full force and effect, notwithstanding "the said matters and things assigned for error. It seems "to us clear that we have not the power to do this, and "that plaintiff in error cannot compel defendant in error "to defend the judgment of the court below twice in this "court under these circumstances."

The demurrer to the replication is sustained and the writ of error is therefore quashed at the costs of plaintiff in error.

1893

Filed

Rehearing denied Dec 11-1915

General Number 6293 April Term, A.D. 1915 Ag. I

National Croation Society of the United States of America
Appellee

Vs.

Mary Pavlic Appellee
Jurs Pavlic
and Veronika Pavlic Appellant

Appeal from Circuit Court Logan County

200 I.A. 601

ELDREDGE, P.J.

Kresimir Pavlic was accidentally killed February 22, 1913. The deceased died without issue, leaving only his widow, Mary Pavlic, ~~appellee~~ defendant. At the time of his death he held a certificate of life insurance for the sum of $650.00 in the National Croation Society of the United States of America. This certificate was issued to him November 14, 1907, and the beneficiaries named therein were his father and mother, Jurs and Veronika Pavlic respectively. At this time he was living at Jerome, Arizona. He subsequently left Jerome, went to Farmington, Illinois, and associated himself with the lodge of said Society located at that place. When he departed from Jerome he left his certificate with the Jerome lodge, though he paid all dues and assessments levied by virtue thereof under the laws of said Society, and was at the time of his death a member in good standing. At the time the certificate was issued to him he was unmarried; but on November 28, 1912, he married ~~appellee~~ defendant Mary Pavlic.

On February 4, 1913, he wrote to the lodge at Jerome ask-

it to send his certificate because he wanted to change the beneficiaries therein; that he could not do so without it and requested that it be sent to the lodge at Farmington, Illinois. On February 19, 1913 he wrote a letter to the Secretary of the lodge at Farmington, Illinois which contained the following instructions:-

"At the same time I beg you, dear Brother, to change the "beneficiaries to my wife, Marija. I do not have a certificate; it " is somewhere at Lodge 138, Jerome, Arizona. Therefore, write to the " National Croation Society that it is there and let them find it". So far as appears from the record the certificate was never sent to him, nor to the lodge at Farmington, and the change in the beneficiaries was never actually made in the certificate.

On August 18, 1913, ~~a~~ defendant Mary Pavlic, widow of the insured, brought an action in assumpsit against the society to recover the amount named in the certificate, and the society by leave of court filed a bill of interpleader making Mary, Jurs and Veronika Pavlic parties defendant thereto. An affidavit of non-residence as to Jurs and Veronika Pavlic having been filed, notices of the pendency of the suit were duly published in a newspaper and mailed to Jurs and Veronika Pavlic at their place of residence, No. 7 Banovina Street, Lic, Croation County, Austria, in accordance with the statute.

On May 26 1914, the defendants to the bill of interpleader, Jurs and Veronika Pavlic, having failed to enter an appearance or plead

to said bill, were defaulted and the cause was referred to the master in chancery to take the proofs and report his conclusions as to the law and facts. On June 23, 1914, after the master had heard the proofs and announced his conclusions, the defendants, Jura and Veronika Pavlic, by their attorney in fact, Charles Pavlic, their son, and a brother of the deceased, entered their motion to vacate the order of default and reference and for leave to file and answer to the bill. This motion was overruled and a decree was entered directing the Society to pay the amount of the certificate to ~~appellee~~ defendant, Mary Pavlic, ~~from this decree Jura Pavlic only has appealed.~~

The decree ~~is~~ was sought to be reversed on two grounds, first, that the Court erred in refusing to set aside the order of default and reference and to allow appellant to file and answer to the bill; and, second, that under the constitution of the Society and the terms of the certificate the change in the beneficiaries was never consummated.

The motion to set aside the default was supported by an affidavit made by Charles Pavlic, as attorney in fact for Jura and Veronika Pavlic, in which he stated that he learned of the institution of this suit May 20, 1914, when he wrote to his parents in regard thereto and that they replied by letter directing him to engage an attorney to look after their interests, and that on June 15, 1914, he employed an attorney for that purpose.

On August 29, 1913, ~~an client,~~ defendant Jura Pavlic, had executed a power of attorney to said Charles Pavlic authorizing the latter to represent him in all legal matters, to collect any money and take all necessary steps in regard to his deceased son, Krcsimir Pavlic, to represent him before any court or outside of court, to start any kind of proceedings, to accept summons, to take any verbal or written stions, to desist from actions , to make settlements, to accept and to lawfully receipt for all money or moneys , and to perform everything whatsoever that might be necessary according to his opinion. ~~Thus, on the 20th day of May 1914, the time when Charles Pavlic stated in his affidavit that he first heard of the institution of this suit, he had had this power of attorney from appellant for nearly nine months. Under it he had ample authority to enter the appearance of appellant and answer the bill.~~ The default was not taken until May 26, a week after he had learned of the institution of the suit, but he waited until June 23, over a month after he had knowledge of the suit before he took any steps in court to represent the interests of the appellant, Appellant himself made no affidavit denying that he had received the notice mailed to him by the clerk. The affidavit was not sufficient either to show that appellant did not receive the notice mailed in accordance with law, or that his attorney in fact acted with diligence.

However, from the view we take of this case appellant has suffered no harm by the action of the Court in refusing to set aside

the insured for nearly three weeks prior to his death had been doing all he could do to have his wife made the beneficiary in his certificate. The only section of the constitution governing the change in beneficiaries was as follows;

"CHANGE OF BENEFICIARY"

" A member may change his beneficiary to whom he has willed "his death benefit. He can change same by a written notice or testament made in a legal manner approved by a Notary Public or other competent "authority and duly signed by the Sub-Assembly's President and Recording "Secretary and stamped with the seal of the Sub-Assembly.

" Testaments or written notices of change in death benefits "shall not be noticed if not put in the general book and on the certificate"

The only part of this provision that is of much weight is the first sentence. What little meaning may attach to what follows can certainly be but directory and not mandatory. The constitution gave him the right to change the beneficiary. He did everything he could do to make the change and we think the decree is right in holding that, in law, such change had been made. Fraternal Tribunes vs Teutsch. 170 Ill.App.47.

The decree will be affirmed.

1897

FILED

Clerk

General Number 6343 April Term A.D. 1910 Agenda Number 4

The People of the State of Illinois, Defendant in Error -vs- Charles D. Johnson Plaintiff in Error	Writ of Error to the County Court of McLean County.

200 I.A. 603

MR. JUSTICE [illegible] delivered the opinion of the court:

The defendant was convicted of selling intoxicating liquor in violation of the statute in the City of Bloomington, the same being Anti-saloon territory, under the act commonly called the Local Option Act entitled- " An Act to Provide for the Creation by Popular Vote of Anti-saloon Territory, Within Which the Sale of Intoxicating Liquor and the Licensing of Such Sale Shall be Prohibited and for the Abolition by Like Means of Territory So Created. " in force July 1, 1907.

There ~~is~~ was ample evidence that the defendant sold a malt liquor containing various percentages of alcohol called "Temp Brew" It ~~is contended~~ was contended that the Court erred in giving certain instructions on behalf of the People, which in substance told the jury that the words- "intoxicating Liquor" include all distilled, spirituous, vinous, fermented and malt liquors, regardless of whether said liquors would, as a matter of fact, produce intoxication. The ~~defendant in error~~ plaintiff offered several instructions, which were refused by the Court, stating in substance, that the burden was upon the prosecution to prove beyond all reasonable doubt that he sold liquor which was, in fact, intoxicating, and the refusal to give them ~~is~~ was also assigned as error.

Section 17 of the Statute provides:- "In all prosecutions under "this act, by indictment or otherwise, it shall not be necessary to state "the kind of liquor sold." The Statute itself defines intoxicating liquor in Section I, as follows:- " Intoxicating liquor shall include all distilled, spirituous, vinous, fermented and malt liquors." That the legislature had a right to declare malt liquor to be an intoxicating liquor irrespective of its intoxicating character is well established. State of Maine V. Fredrickson, 101 Me.37; State v Dunoss, 16 R.I. 401; Commonwealth v. Anthis, 12 Gray(Mass.)29; Commonwealth v Breesford, 161 Mass.61; State v. Certain Intoxicating Liquors, 76 Ia. 243; State v. Woodworth, 50 Conn. 55; Douglas v. State, Ind. App. 302. In the case of Commonwealth V. Snow 133 Mass 575, it was held proper to refuse an instruction that the jury must find from the evidence that the lager beer sold was intoxicating where the statute declared that it should be considered such; and that there was no duty imposed on the State to prove that it was intoxicating. That the defendant was guilty of selling intoxicating liquor within the meaning of the statute there can be no question.

Friebleman v State 130 Ala. 122; State v O'Connell, 99 Iowa 6

The other error relied upon is the claim that the witness, Dr. A.W. Momberger, chemist of Weslyan University, was permitted to testify as to what was the legal definition of intoxicating liquor. We have examined the evidence given by this witness as shown by the bill of exception and are of the opinion that this contention cannot be sustained.

The judgment must therefore be affirmed.

202

1816

FILED

General Number 6355 April Term, A. D. 1915 Agenda Number 10.

The People of the State of Illinois,)
Defendant in Error,)
- vs -)
Michael Elliott and Otho Jennings,)
Plaintiffs in Error.)

ERROR TO THE
CIRCUIT COURT OF
MACON COUNTY.

200 I.A. 607

ELDREDGE? P. J.

The plaintiffs in error were convicted upon an indictment containing 71 counts, the first 70 of which charged the illegal sale of intoxicating liquor in the Town of Decatur, while the same was anti-saloon territory, and the 71st count charged the keeping of a place where intoxicating liquor was sold contrary to the form of the statute. Trial was had by jury and each of the plaintiffs in error was found guilty upon each count.

The Town of Decatur, by a vote of the people on the 7th. day of April A.D.1914 became dry territory. The evidence for the people showed conclusively that the defendants, who had been in the saloon business before the town became dry territory, continued to run their drum shop in the City of Decatur within said town openly for a long period of time thereafter. The defendants did not testify themselves, nor offer any evidence, and made no defense whatever. The Court imposed the minimum fine and the minimum jail sentence under each count against each defendant, and it was urged that the aggregate punishment was excessive. The penalty for violations of the act is fixed by statute, which this court has no

~~authority to change.~~

~~Some criticism is made of the form of the judgment.~~ In entering judgment the Court ordered and adjudged, in substance, that the defendant, Otho Jennings, make his fine unto the People of the State of Illinois, in the sum of $20.00 on each of the first 70 counts, and that he make his fine unto the People of the State of Illinois in the sum of $50.00 on the last, or 71st. count, of the said indictment; that he be confined in the common jail of Macon County for a period of ten days on each of the first 70 counts of said indictment; that he be confined in the common jail of Macon County for a period of 20 days on the last, or 71st count, of the said indictment; that the jail sentences imposed herein run consecutively making a total of 720 days in jail; that he stand committed until said fine and costs are fully paid, or until he shall be otherwise discharged according to law. Substantially the same form of judgment was entered as to the defendant, Michael Elliott. ~~We do not see how these judgments could be made any formal.~~

~~A great number of instructions were given on behalf of both the People and the defendants in the court below, and a large amount of evidence was introduced on behalf of the People. There was no reversible error in the rulings of the trial court upon the admission of evidence, or upon the giving or refusing of the instruction.~~

The Judgment is affirmed.

7 (13530—2-60)

STATE OF ILLINOIS

APPELLATE COURT—THIRD DISTRICT

200 I.A. 605

AT AN APPELLATE COURT, Begun and held for the Third District of the State of Illinois, at

Springfield, on the FIRST TUESDAY in OCTOBER A. D. 1915

PRESENT

HONORABLE EDGAR ELDREDGE, Presiding Justice

HONORABLE GEORGE W. THOMPSON, Justice

HONORABLE EMERY C. GRAVES, Justice

Attest: Geo. L. Tipton ~~ROBERT L. CONN~~, Clerk.

BE IT REMEMBERED, that afterward, to-wit: On the 13th day of October, A. D. 1915, there was filed in the office of the said Clerk of said Court, an opinion of said Court, in words and figures following:

F I L E D

Oct 13 1915

Geo. L. Tipton
Clerk
Appellate Court 3rd Dist.

General Number 6348; 6349; 6350; 6351. April Term, A.D.1915. Agenda Number 7.

The People of the State of Illinois, Defendant in Error,
-vs-
Adolph Schlick and Bernhart Kile, Plaintiffs in Error.

The People of the State of Illinois, Defendant in Error,
-vs-
George Schenk, Plaintiff in Error.

The People of the State of Illinois, Defendant in Error,
-vs-
Charles Seibert and John Seibert, Plaintiffs in Error.

The People of the State of Illinois, Defendant in Error,
-vs-
Anthony Shearer and Harry Meisenhelter, Plaintiffs in Error.

WRITS OF ERROR TO CIRCUIT COURT OF MACON COUNTY.

ELDREDGE. P.J.

These are writs of error to the Circuit Court of Macon County to reverse judgments of conviction against the plaintiffs in error on indictments under the state law for violations of the act known as the Local Option Law, in force July 1, 1907. By agreement of the parties all the writs of error were consolidated in this court. Trial by jury was waived in all the cases and they were tried by the Court on agreed stipulations of fact. The stipulations of fact in these cases are identically the same as those which appear in the case of the City of Decatur vs Adolph Schlick, et al, 269 Ill. 181 page, with the exception that in the latter case the judgments appealed from were obtained by prosecutions brought under a city ordinance of the City of Decatur, while the judgments from which the writs of error were prosecuted from this court were obtained by prosecutions under the statute. The above case is referred to for these stipulations.

The only question involved in these writs of error is whether the several defendants in error were guilty of violating said act by means of shifts and devices. The Supreme Court upon the same facts having decided this question in the affirmative, it must be considered as res adjudicata in this court, and the judgments are therefore affirmed.

(817)

General Number 6359. April Term, A.D.1915. Agenda Number 13.

George P. Van Cleave, Appellant, -vs- P. H. Fitzsimmons and Katie E. Knox, Appellees.	APPEAL from the County court of Macon County.

200 I.A. 609

EDDREDGE, P.J.

In vacation after the December Term, A.D.1911, of the County Court of Macon County, ~~appellant~~ plaintiff took judgment by confession against ~~appellees~~ defendants, on two promissory notes for the sum of $531.20, together with costs of suit. At the December term, A.D.1912, of said court, on motion of ~~appellees~~ defendants, the judgment was opened up, and they were given leave to plead. They filed a plea of non-assumpsit, and a special plea purporting to be a plea of usury. ~~Appellant~~ Plaintiff demurred to the special plea, which was overruled, and he elected to abide by his demurrer; whereupon final judgment was entered in favor of appellees. The only question presented on ~~this~~ appeal ~~is~~ was the sufficiency of the special plea.

~~The special plea~~ It, in substance, avers that the supposed promissory notes in said declaration mentioned, were for the payment of interest at a greater rate of interest than is allowed by law; that they were not taken nor received by the plaintiff in the usual course of trade, and that the plaintiff at the time he received the said notes under the endorsement

thereof to him, well knew the consideration of the making, executing and delivering of said notes.

Usury is alleged in this plea in general terms only, and the aver~~ats~~ments are but mere conclusions of the pleader. It is not sufficient to plead in general terms that a transaction is usurious, but the facts constituting the usury must be set forth. Stanley vs. Trust & Savings Bank, 165 Ill. 295.

The court erred in overruling the demurrer in this plea. The judgment will therefore be reversed and the cause remanded with directions to sustain the demurrer to the plea.

General Number 6365. April Term. A.D. 1915. Agenda Number 19.

The People of the State of Illinois.

Appellee,

vs.

William Coleman, Jr.,

Appellant.

Appeal from County Court, Jersey County.

200 I.A. 610

WILLIAMS, P.J.

This is an appeal from the judgment of the County Court of Jersey County rendered on the verdict of the jury finding that appellant was the father of the bastard child of Ora Tucker.

On August 26, 1914, Ora Tucker filed her complaint before the justice of the peace charging, " that on or about the -------day of April, 1914, the crime of bastardy was committed in said county, and named ~~appellant~~ defendant as guilty of said crime." ~~No complaint is made as to the form of the complaint, and no error is assigned thereon.~~ The child was born October 28, 1914, and the prosecutrix testified that the acts of intercourse which caused her condition took place on the evening that she attended a show with ~~appellant~~ defendant at the Modern Woodmen Hall in the town of Fidelity, which was on the last Wednesday in January, 1914, and also on the following Sunday evening. ~~Appellant~~ Defendant admitted in his testimony to having had many acts of intercourse with the prosecutrix, but that she having positively testified as to the particular dates when such acts took place which caused her condition that she must prove those acts as of such particular dates, and as the preponderance of the evidence showed that

he was not with her in Fidelity at those times the verdict was contrary to the evidence. ~~We do not construe her evidence as showing a positive assertion that the acts took place on the last Wednesday in January and the following Sunday, but rather that they took place at a time when she went with appellant to a show that was given in the Modern Woodman Hall during the month of January, 1914, and on the Sunday following that time. Nor do we think that the preponderance of the evidence shows that appellant was not with her on those occasions.~~ The prosecutrix was corroborated in her testimony in this regard by several witnesses who ~~are~~ were at least as disinterested as those who testified for ~~appellant,~~ defendant; ~~and it was a question of fact for the jury to determine with whom was the weight of the evidence. The nature~~ of the proceeding was to determine whether appellant was the father of the child, and it was immaterial on what particular day the acts of intercourse took place, if, in fact, appellant was the father of the child. Wolcomb v. People, 79 Ill. 409.

It ~~is~~ was further contended that as the complaint charged that the acts of intercourse took place in April, 1914, and as the prosecutrix testified on the trial that they were committed in January, 1914, ~~appellant~~ defendant was taken by surprise, and did not have sufficient opportunity for procuring evidence to contradict her testimony, and in support of the motion for a new trial affidavits were filed by several officers of the Fidelity Camp of the Modern Woodmen to the effect that no entertainment of any kind was given in the Modern Woodmen Hall on behalf of the Modern Woodman on the evening of the last Wednesday in January, 1914, and one affidavit stated that no entertainment of any kind was given on behalf of said camp in said hall on any night during

the same as those which appear in the case of the City of Decatur vs Adolph Schlick, et al, --- Ill. ---- Page, with the exception that in the latter case the judgments appealed from were obtained by prosecutions brought under a city ordinanceof the city of Decatur, while the judgments from which the writs of error were prosecuted fom this court were obtained by prosecutions under the statute. The above case is referred to for these stipulations.

The only question involved in these writs of error ~~is~~ was whether the several defendants in error were guilty of violating said act by means of shifts and devices. The Supreme Court upon the same facts having decided this question in the affirmative, it must be considered as res adjudicata in this court, and the judgments are therefore affirmed.

said month of January. But it appeared that said hall was also used by a society known as the Royal Neighbors of America, and ~~and while there is an affidavit of one of its officers that no entertainment was given in the Woodmen Hall on behalf of said order of the latter organization on the evening of the last Wednesday in January,~~ the affidavit did not state, and no affidavit was filed, stating that there was not in fact an entertainment given on behalf of the Royal Neighbors of America in said hall, or one given under some other auspices, on some night during the month of January. The affidavits were not sufficient to show that there was not an entertainment of some kind given in said hall during said month. Appellant admits having had many acts of intercourse with the prosecutrix, and the only conflict in the evidence is as to the time when they took place, which is immaterial, and as there is no evidence of any such acts having been committed by her with any other man during the period of gestation, we cannot hold that the proofs do not sustain the complaint.

The judgment of the County Court is affirmed.

General Number 6348 April Term, A.D.1915 Agenda Number 7.
6349
6350
6351.

The People of the State of Illinois, Defendant in Error.	
vs/	
Adolph Schlick and Bernhart Kile, Plaintiffs in Error.	
The People of the State of Illinois, Defendant in Error.	
vs	
George Schenk, Plaintiff in Error,	WRITS OF ERROR
vs	TO
The People of the State of Illinois, Defendant in Error,	CIRCUIT COURT
vs	OF MACON COUNTY.
Charles Seibert and John Seibert, Plaintiffs in Error.	
The People of the State of Illinois, Defendant in Error,	
vs	
Anthony Shearer and Harry Meisenhelter, Plaintiffs in Error.	

MILDREDGE, P.J.

These are writs of error to the Circuit Court of Macon County to reverse judgments of conviction against the plaintiffs in error on indictments under the state law for violations of the act known as the Local Option Law, in force July,1, 1907. By agreement of the parties all the writs of error were consolidated in this court. Trial by jury was waived in all the cases and they were tried by the court on agreed stipulations of fact. The stipulations of fact in these cases are indentically

FILED

Gen. No. 6374. April Term, A.D. 1915. Agenda Number 28.

The People, ex rel Sam D. Price,
Appellee,

-vs-

C.A. Asking,
Appellant

Appeal from
Circuit Court
Shelby County.

200 I.A. 621

ELDRIDGE, P. J.

~~This is an action of mandamus [illegible] against appellant to compel him to turn over [illegible] funds, etc., that he had held~~ Respondent was school treasurer of township 10, range 3, East of the Third P.M. in Shelby County, Illinois. It appears from the record that the trustees of said school district met on April 11, 1914 [illegible] purpose of electing a president and treasurer. At this time ~~appellant, C. A. Asking,~~ respondent was holding the office of treasurer, having been appointed thereto by the old Board. The record of the meeting ~~is~~ was as follows:-

State of Illinois, Shelby County, ss.
April 11, 1914.

"Trustees of Schools of Township Ten (10) Range Three (3) met at No. 6 School, District No. 47, directly after the election of trustees, and proceeded to organize by electing H.M. Archey, president of the board of Trustees.

S.A.D. Howe nominated C.A. Asking for treasurer of the board for the ensuing term.

J.F. Banning nominated Sam D. Price.

H.M. Archey decided the nomination by favoring Sam. D. Price for treasurer for the coming term."

The record of this meeting was written up by ~~appellee, C. A. Asking,~~ respondent as clerk of said Board. The minutes,

Sam D. Price, was not at the meeting of the Board, but, upon being notified subsequently of his election as treasurer, executed a bond in proper form, which was approved by each member of the Board, and delivered it to the County Superintendent of Schools who endorsed thereon- "Received, Approved and filed in my office May 4, 1914. Lee W. Frazer, County Superintendent." Thereafter the relator made a written demand upon ~~appellant~~ respondent, to turn over to him the school funds, books and properties as treasurer of said school district. This ~~appellant~~ respondent refused to do, ~~and on a trial before the court without a jury judgment was rendered against him in favor of the relator.~~

Much oral testimony was heard in the trial court, some of which may have been incompetent; but as it is presumed that the trial court only considered competent evidence it is unnecessary to pass upon the questions raised in regard thereto if there is sufficient competent evidence in the record to sustain the judgment of the court. Much of this evidence now complained of by appellant was of the same character and to the same effect as that introduced by himself. No propositions of law were presented to the trial court to passupon.

The principal contentions of ~~appellant may be be~~ respondent are, first, that the record of the meeting ~~does~~ did not show that the relator was elected treasurer; second, that the record of the meeting not having been signed by the president and clerk of the Board of Trustees, it was not authenticated and should not have been received in evidence; and, third, that there was no proper approval of the bond of the relator by the County Superintendent of Schools.

The record of the proceedings was written up by the appellant and he cannot now complain of its form. In our opinion it sufficiently shows the election of the relator as treasurer. It is insisted, however, that the provisions of the statute directing that the minutes of each meeting be signed by the president and clerk is mandatory, and as they were not so signed therein no record of the election of the relator as treasurer. If this section of the statute

is mandatory, then it became the duty of appellant, as clerk, to sign the record himself as such, and he cannot defeat the right of is successor in office by his own wilful misconduct. The attitude of appellant in his brief and argument seems to be that he has some vested right to this office. School trustees have the power to appoint a township treasurer for the term of two years, and to remove him for good and sufficient cause; and this power of removal requires no formal charge, no notice to the incumbent, no form of procedure, and is not subject to review. Hertel vs. Boismenue, 229 Ill. 474. The bond was approved and accepted by each of the trustees by endorsement thereon in themanner approved by the statuas,- Holbrook vs Trustees, 22 Ill. 539; Bartlett vs. Board of Education, 59 Ill. 364,- as it wa also by the County superintendent.

The fact that the County Superintendent did not give relator a written certificate that he was such treasurer cannot affect relator's right thereto. The bond was in proper form, approved and accepted by the trustees, and it was the duty of the County superintendent to receive, approve, file and record the same and give relator his certificate of office. Hertel vs. Boismenue, supra. The relator is prima facie the school treasurer, and as such is entitled to the funds, etc., of the school district, and his title to the office cannot be tried in an action of mandamus. Hertel vs. Boismenue, supra; State v. Johnson, 15 Fla. 2; State v. Oatos, 86 Wis. 634; State vs. Sherwood, 15 Minn. 221;; State v. Sullivan. 4 N. Dak. 481; Warner v. Myers, 3 Ore. 218; 19 A. & E. Ency. Law, 767.

We can see no merit in the contentions made by appellant, and the judgment will be affirmed.

GENERAL NUMBER 4317 APRIL TERM, A. D. 1916 Agenda Number 31.

W. T. Pleasy,

Appellee,

- vs -

STATE BANK OF LATHAM,

Appellant.

Appeal from

Circuit Court

Logan County.

FILED

Clerk

ELDREDGE, P. J.

200 I.A. 624

This appeal is prosecuted to reverse a judgment for the sum of [illegible] rendered in favor of appellee and against appellant to recover funds deposited in the latter's bank.

Plaintiff ~~Appellee~~ for several years had been a tenant on farm land near Latham, Illinois, which was controlled by one Oscar J. Lucas and had become indebted to said Lucas, for which indebtedness he had given three promissory notes. Two of these notes were for the principal sum of $2000.00 each, and one of them had a credit on it of $200.00. The third note was for the principal sum of about $450.00, which, at the time of the transaction in controversy, was past due and on which, together with the accumulated interest, there was due $523.31. Plaintiff ~~Appellee~~ was also indebted to the bank, evidenced by a promissory note, on which was due, including the accumulated interest, $279.80. In order to pay off some of this indebtedness Plaintiff ~~appellee~~ held a sale on the farm and requested Mr. Walter Volle, cashier of the bank, to act as clerk at the sale to look after the proceeds, and, according to the testimony of Volle, told him to first take out of the proceeds of the sale the amount due on his note to the bank, and turn the balance over to Mr. Lucas. On the day after the sale Mr. Lucas and Plaintiff ~~appellee~~ went to the bank to make an application of the proceeds of the sale. The total amount of the proceeds of the sale was $355.18. Plaintiff's ~~Appellee's~~ note to the bank, with the accumulated interest, amounted to $279.80. The bank purchased the notes given at the sale from Plaintiff ~~appellee~~ at a discount of $26.00, making the total amount due the bank at that time from Plaintiff ~~appellee~~, the sum of $307.80. The balance of the proceeds of the sale, amounting to $657.38, was deposited by Volle in the bank to Plaintiff ~~appellee~~.

credit. Some property belonging to other persons was sold at the same sale, and the proceeds derived from such property amounted to $85.23, and this amount was checked out by ~~appellee~~ plaintiff to the parties to whom it belonged, leaving the amount in controversy $571.15.

When ~~appellee~~ plaintiff and Lucas came to the bank on the day following the sale, they went into a back room for the purpose of carrying on their negotiations. After this conference the bank executed the following paper:-" Latham, Ill. Feb. 11, 1914. "No.----- State Bank of Latham, 76-1406. Pay to O. J. Lucas, " or order, $571.15. Five Hundred and Seventy-one and 15-100 "Dollars. Charge W. S. Pichey." This was endorsed on the back by O. J. Lucas, and stamped paid by the State Bank of Latham, Illinois, February 12, 1914.

Towards the latter part of March or the first part of April, ~~appellee~~ plaintiff had an overdraft at the bank of $40.00 which he paid. On the 7th day of July, 1914, Lucas took judgment by confession on the two $2,000.00 notes for the sum of $4,041.00. On one of the notes were the endorsements:- "Paid August 30, 1913. "Two Hundred Dollars. Paid February 11, 1914 Forty-one 84-100 "Dollars." On July 18, 1914, Lucas and ~~appellee~~ plaintiff made a written agreement wherein Lucas agreed to satisfy said judgment of $4,041.00 in consideration that ~~appellee~~ plaintiff deliver to him one gray mare, and the undivided one-half interest in 120 acres of corn, which ~~appellee~~ plaintiff agreed to husk and deliver at the elevator in Latham. The judgment was therefore satisfied of record, by Lucas. It was not until after this judgment was satisfied of record that ~~appellee~~ plaintiff made any claim to the bank that it had wrongfully paid the amount in controversy to Lucas, and did not bring suit to recover the same until September 21. The above facts are all undisputed, and the basis of this suit for the recovery of this amount from the bank ~~is~~ was the claim by ~~appellee~~ plaintiff that he never authorized the bank to pay the $571.15 to Lucas. ~~Appellee~~ Plaintiff denied that he ever told Volls to pay any part of the proceeds of said sale to Lucas.

~~[illegible] of the trial court upon the evidence and exclusion of evidence.~~ ~~Appellee~~ Plaintiff

cross examination was asked the following question:- " You owed the bank there some money that was taken out of the sale money, did you not?" To this an objection was sustained. ~~We think this question was certainly competent as being part of the res gestae.~~ On cross examination he was also asked if he did not tell Mr. J. H. Miller that all the proceeds of the sale were to be paid or turned over to Lucas, to which an objection was sustained. ~~This question was competent as tending to corroborate the witness Volle that appellee authorized him to turn over such proceeds.~~ Further, on cross examination he was asked if he did not tell Volle on the morning of the sale that all the proceeds of the sale were to be turned over to Lucas as a credit on what he owed him . To this also an objection was sustained. ~~This question was clearly proper under the issues in this case.~~ Also, on cross examination ~~appellee~~ plaintiff was asked if Mr. Lucas did not turn over to him at the time of his conference with him in the bank after the sale, the small note of $450.00, to which the witness answered no. It was the contention of ~~appellant~~ defendant on the trial that at the meeting in question between Lucas and ~~appellee~~ plaintiff that the former turned over to ~~appellee~~ plaintiff the $450.00 note, and that out of the balance that was due ~~appellee~~ plaintiff out of the proceeds of the sale there was $41.84 left, which Lucas endorsed upon one of the $2,000.00 notes, ~~and every circumstance in the case tends to show that these were the true facts and to corroborate Volle in his statement that appellee told him to pay these proceeds to Lucas.~~ It was undisputed that the $41.84 was endorsed as paid upon one of the $2,000.00 notes, as heretofore shown. ~~There did it come from, and how was this amount arrived at, if it was not in accordance with the facts as testified to, or attempted to be testified to, by Volle and Lucas?~~ Further, on cross examination counsel for ~~appellant~~ defendant asked ~~appellee~~ plaintiff if he did not owe Lucas a note about that time for about the sum of $450.00. To this question also an objection was sustained. He was further asked if he didn't know what notes Lucas held against him, to which an objection was sustained. ~~These questions were all proper and the objections to them should have been overruled. Space will not permit us to discuss all the alleged errors in sustaining objections in the direct examination of Volle. We will say, however, that his direct examination was altogether too much restricted.~~ The entire testimony of the witness Lucas was stricken out of the record ~~for most reason as~~

~~are usually to be commended,~~ and the court ~~even went so far as to~~ sustained the motion made by ~~appellee's~~ plaintiff's counsel to strike from the record all the testimony of the witness Volle of about and concerning conversations had between him and ~~appellee~~ plaintiff about ~~appellee's~~ plaintiff's sale and about the proceeds of his sale insofar as it pertained to any authorization to make payment of any portion of the proceeds to Lucas.

Witness Volle testified that when he and ~~appellee~~ plaintiff met in the bank on the day after the sale he delivered to ~~appellee~~ plaintiff the $450.00 note and gave him credit for the balance of the proceeds amounting to $41.84 on one of the $2,000.00 notes, and he ~~is~~ was corroborated by the $2,000.00 note on which this credit appears. It ~~is~~ was undisputed that ~~appellee~~ plaintiff knew that bank had turned over the balance of these proceeds to Lucas for months before he made any claim for the same and even paid an overdraft of $40.00 on his account after the same had been done, ~~and the facts bear strongly to show that even if appellee did not verbally authorize the bank to turn over the balance of the proceeds to Lucas that he ever rightly entitled his action in so doing.~~ If the testimony of the witnesses, Volle and Lucas, limited as it was, had not been erroneously excluded, it would be our duty to reverse this judgment on the ground that it is contrary to the clear and manifest weight of the evidence.

What we have said practically disposes of the various objections made to the instructions. The judgment is reversed and cause remanded.

General Number 6382. April Term, A.D.1915. Agenda Number 34.

Charles P. Wilson, Appellee,	)	Appeal from Circuit Court Vermilion County.
vs.	)	
The Hartford Fire Insurance Company, a corporation, Appellant.	)	

200 I. A. 626

Eldredge, P.J.

This is an action of assumpsit to recover upon a parole agreement to renew a fire insurance policy at the time of its expiration. This case was before us on a former appeal and is reported in 188 Ill. App. 181. The evidence in the record on this appeal is substantially the same as it was in that on the former appeal. We held on the former appeal that as the original declaration did not aver the ownership of the property in appellee, nor that he had any insurable interest therein the giving of the two instructions which stated, in substance, that if the jury believed from the evidence that all the allegations contained in plaintiff's declaration were true then its verdict must be for the plaintiff, were erroneous, as peremptory instructions must include every element necessary to recovery. After the case had been reversed and remanded, and reinstated in the trial court, appellee filed an additional count which contained substantially the same allegations as the original count except that instead of merely averring that appellant agreed with appellee to renew the policy, it was further alleged that "defendant agreed with

plaintiff to renew the policy for his benefit and in his favor", and with the further exception of an additional averment, " that at said time, and at the time of the loss of the policy, the plaintiff ~~af~~ was the owner of the same." Many q uestions raised on the former appeal are again presented, but as to such our former opinion is res adjuticata. The only new question on this appeal requiring consideration is the contention that as the policy contained a provision that no action to recover upon the policy shall be sustainable unless commenced within one year from the time of the loss, and as the additional count stated a new cause of action and was filed more that one year after the loss, appellee is barred from any recovery thereunder. The answer to this isthat this suit was not brought to recover upon the policy, but upon a contract to renew the same.

There being no reversible error in the record, the judgment is affirmed.

General Number 6391. April Term, A.D. 1916. Agenda Number 3.

Chas. Johnson Hardware Co., Appellant, vs. Board of Education of School District No. 96, Fulton County, Illinois, Appellee.	Appeal from Circuit Court Fulton County.

200 I.A. 638

Eldredge, P.J.

Appellant filed its bill in the Circuit Court of Fulton County to establish a mechanic's lien as a sub-contractor on the money due or to become due the contractor for the construction of a public school building in the City of Cuba, Fulton County. W.H.Gard, the contractor, was defaulted, but the Board of Education filed its answer, which, among other things, denied that said Board ever received any written notice of appellant's claim. Upon a replication being filed to the answer, the cause was referred to the Master in Chancery, who found, among other things, as follows:- "SIXTEENTH:-I therefore hold that the account of the Johnson "Hardware Company against the said W.H.Gard which was de-"livered to the said J.O.Applebee, president of said Board "of Education on the 10th day of November, 1913, was not "sufficient in substance and form as required by the statutes "of the State of Illinois, to create a lien on said funds then "remaining in the hands of said Board of Education." Upon a hearing before the Court upon appellant's exceptions to this finding, the same were overruled and the bill was dismissed for want of equity. The bill is based upon Sec. 23 of the Mechanic's Lien Act, which, in part, is as follows:-" Any

"person who shall furnish material, aparatus, fixtures,
"machinery, or labor to any contractor for a public improve-
"ment in this state, shall have a lien on the money, bonds,
" or warrants due or to become due such contractor for such
"improvement; Provided, such person shall, before payment or
"delivery thereof is made to such contractor, notify the
"officials of the state, county, township, city or municipality
"whose duty it is to pay such contractor of his claim by a writ-
"ten notice."

The written notice of appellant's claim delivered by him to the President of the Board is as follows:-

"Peoria, Ill. Nov. 10, 1913.

"Mr. W.H.Gard,
Bought of Chas. Johnson Hardware Co.,
2023 South Adams Street,
~~Manufactures of Dealers in Galvanized Iron Cornice,~~
Tin, Hard Stoves, ~~Furnaces, Ware and Slate Roofing,~~ and house
Furnishing Goods, ~~Builder's Hardware,~~ Carpenters' and Coopers'
Tools, ~~Belting,~~ Packing, Steam Hose, ~~Steam and Hot Water Heating,~~
~~Tin, Copper and Sheet Iron Work.~~

Nov. 1,	Contract Job, Roofing, Galvd. Iron and Tin Work and Sky-lights on Cuba Schools-	1,160.00	
	Cr.		
Sept. 15,	By Cash-	500.00	660.00

The question for determination in this case is whether the above is such a written notice of appellants' claim as is contemplated by Sec. 23. While it is true that said section does not provide for any form of such notice, yet mechanic's lien laws must receive strict construction. In our opinion this alleged notice is wholly insufficient. The statute provides that before any person can establish such a lien he shall notify the officials of the municipality, whose duty it is to pay such contractor, of his claims by a written notice. The notice in this case does not claim any lien on any unpaid funds, does not show what materials were furnished to the contractor, and

does not even state that they were furnished to the contractor for the purpose of being used by him under his contract in the construction of the school building. There is nothing in the notice that can in any way apprise the owner that appellant claims a lien upon the unpaid funds under the contract with Gard, or that he furnished any materials to the contractor under his contract for the construction of the building. From the reasoning in analogous cases we must hold that this notice is insufficient under Sec. 23 upon which to establish a lien. LaCrosse Lumber Co. vs. Grace M.E. Church, 180 Ill. App. 587; Germania Life Ins. Company vs. Klewer, 27 Ill. App. 589; Davis vs. Rittenhouse & Embree Co. 92 Ill App. 341; Watenkamp vs. Billigh, 27 Ill. App. 585.

The decree of the Circuit Court will be affirmed.

1907

GENERAL NUMBER 6399 April Term, A. D. 1915 Agenda Number 46.

CONGREGATION OF BNAI ABRAHAM,
a corporation, Appellant,
- vs -
SARAH KANNER,
Appellee.

Error to the Circuit Court of Sangamon County.

FILED

200 I.A. 640

ELDREDGE, P. J.

Appellant brought its action in assumpsit against appellee to recover upon the following written instrument executed by her:

"February 23, 1914.

"I, Sarah Kanner, in consideration of my love and fond memory of my "late husband, Isadore Kanner, and in further consideration of the funeral rites "performed and to be performed upon my said late husband, hereby promise to pay "the present encumbrance upon this congregation, Bnai Abraham, at Seventh and "Mason Streets, amounting to $1,900.00 within six months from date, I hereby further "empower the trustees of the said congregation to enforce my said promise.

"Sarah Kanner.

"Witness:"

Appellant appeals from the judgment of the Circuit Court sustaining a general and special demurrer of appellee to the second amended declaration, which consists of two counts. The first count avers that the plaintiff is a religious organization, organized under the laws of the State of Illinois and was the owner and possessed of certain real estate located at the south east corner of Mason and Seventh streets in the City of Springfield, and there carried on a place of worship in accordance with the doctrines of said church, and then and there had trustees who were duly elected by said congregation; that one Isadore Kanner, late husband of appellee, in his lifetime, was a member of said congregation; that on the 23rd day of February, 1914, appellee executed and delivered to it the document hereinabove mentioned by which said promise in writing appellee then and there undertook and promised to pay to appellant, or to its benefit, or to its mortgagees, or debtors, the sum of $1,900.00 within six months from the date thereof for the use and benefit of the appellant congregation; that at the time of making said promise in writing appellant was indebted to the First Trust & Savings Bank of the City of Springfield in the sum of $1,900.00, which said indebtedness was then secured by a certain

mortgage deed executed by appellant through its trustees; that demand had been made upon appellant for the payment of said sum of money by said bank and that said trustees had been required to pay out additional money to prevent foreclosure of the same; that appellant has requested the payment of said sum of $1,900.00 from appellee by its trustees, and that appellee either pay the same to said bank or to appellant for the purpose of liquidating said mortgage; but that appellee has refused so to do, etc. The second count is substantially the same with the addition of the further averments that the funeral rites specified were performed upon the said Isadore Kanner, husband of appellee, after the making of said written instrument and in consideration thereof; that appellee knew of the existence of said mortgage lien upon the said real estate at the time she executed said promise in writing, and has since known that the same is unpaid and who the mortgagee was: that appellee did not pay said bank within six months from the date of said written promise said sum, whereby and by means whereof appellee became liable to pay appellant the sum of $1,900.00, and being so liable then and there undertook and promised to pay appellant when thereunto requested, the said sum of $1,900.00, that appellant requested appellee to pay said trustees said sum to be used to liquidate said indebtedness; yet appellee refused, and still does refuse, to pay appellant, or its trustees, or to said bank, said sum, etc.

The instrument itself does not purport to be a promise by anybody to anybody except by the maker thereof to herself. In our opinion it is a mere naked written personal pledge unsupported by any valid consideration whatever, and one which appellee may carry out or not as she sees fit.

The judgment is affirmed.

1718

General Number 6404. April Term, A.D. 1915. Agenda Number [illegible]

CHARLES CHIP, Appellee,	)	Appeal from
vs	)	County Court
C.C.C. & St. L. RY. CO.,	)	Edgar County.
Appellant.	)	

200 I.A. 641

ELDRIDGE, P. J.

Appellant appeals from a judgment for the sum of $175.00 rendered against it in anaction on the case in favor of appellee for the failure to furnish proper and sufficient cars for the transportation of hogs from Paris, Illinois, to East Cambridge, Massachusetts. The case was tried upon the third and fourth counts of the declaration, which are substantially the same, and aver that on the 10th day of December, 1913, appellant received from appellee a large number of hogs to be carried by it from the city of Paris to East Cambridge; that it then and there became the duty of appellant to furnish proper and sufficient cars for the transportation of said hogs, and on account of its failure so to do appellee was compelled to and did ship said hogs to Indianapolis, Indiana, whereby they became greatly damaged and lessened in value.

It appears from the evidence that ~~appellee~~ plaintiff requested ~~appellant~~ defendant to furnish double deck cars for these hogs, but that ~~appellant~~ plaintiff was unable to procure double decks cars, but did furnish single deck cars. It ~~does~~ did not appear that ~~appellee~~ plaintiff made any protest upon the character of the cars but accepted the

same and shipped his hogs to Indianapolis. Plaintiff testified upon direct examination that he ordered the cars for the purpose of shipping the hogs to East Cambridge, but on cross examination he stated that he was not sure whether he ordered the cars in order to make the shipment to East Cambridge or to East Buffalo. New York. The records of appellant show that his order was for cars in which to ship the hogs to East Buffalo, New York. The evidence showed that one carload of hogs was sold in Indianapolis at $9.50, and the second load at $5.05 per hundred pounds. Plaintiff further testified that just before he made the shipments that he had telegrams from the J.W.Squire Company, pork packers at East Cambridge, that the price for top hogs at that place was $11.50 per hundred pounds dressed for pork. He also testified that the cost of shipping the hogs to East Cambridge would be about $2.50 or $2.60 per hundred, and that the freight rate was 33½ cents per hundred. A few of the hogs were sold to local parties at Paris, Illinois, for $8.50 per hundred pounds. There was no evidence as to what the hogs weighed at Indianapolis, or whether the price received for them there was for live hogs or for hogs dressed for pork. There was no evidence of the number or weight of the hogs sold at Paris. There was no evidence of any kind in regard to a shipment of hogs to East Buffalo, New York. There was no evidence that the cars furnished were not proper and suitable for the shipment of the hogs to East Cambridge except that of plaintiff himself. Defendant plaintiff called appellee to the witness stand as his own witness, and he testified that the cars he shipped the hogs in were ordinary 40 foot stock cars, and that he made no complaint of the character of the card. On cross examination, over objection of appellant, he was permitted to testify that the cars he used in the shipment of the hogs to Indianapolis were not such as are ordinarily and usually used by well

regulated railroad companies for the transportation of live stock for such a distance as from Paris to East Cambridge; also that double deck cars with water troughs in them were such as are usually and ordinarily provided by well regulated railroad companies for the transportation of live stock between said points. This cross examination was improper, as appellee was asked nothing in his direct examination in regard to these matters. The evidence is uncontradicted that double deck stock cars are not in general owned by railroad companies themselves, and that appellant owned no such cars; that the double deck stock cars are owned by special transportation companies and are leased to the railroad companies as their demands may require; the reason for this being that railroad companies cannot afford to keep on hand at all times special particular kinds of cars such as refrigerator cars, palace stock cars, cars for the transportation of meats, dining cars, parlor, cars, sleeping cars, etc., and that the business of one railroad company in one part of the country in certain seasons of the year demand a large number of these various kinds of cars, while other railroad companies in other parts of the country in other seasons of the year demand very few of them; consequently, most of these special kinds of cars are owned by various different companies who lease the same to the railroad companies as their demands may require. It is undisputed in the evidence that appellant made efforts to procure double deck cars for appellee, but was unsuccessful in getting them.

From the state of the evidence in this record we must hold, first, that there is no evidence which a jury could estimate any damages; and , second, that there was no competent evidence that appellant failed to furnish proper and suitable

care for the shipment of said hops.

The judgment is therefore reversed and the cause remanded.

Petition denied Dec 11th 1915 [illegible]
Opinion filed, and filed of same date

General Number 6407. April Term, A.D.1915. Agenda Number 55.

HARLEY J. WHITE, Appellee, -vs- MARGARET HOLDEN, Appellant.	Appeal from Circuit Court McLean County.

200 I.A. 643

ELDRIDGE, P. J.

Appellee recovered a judgment in a forcible entry and detainer proceeding against appellant for the possession of certain premises known as 502 South Wright street in the City of Bloomington. The evidence shows that appellant refused to pay the rent under the lease and was using the same for immoral purposes.

The principal contention made in this court is that the trial court erred in overruling appellant's motion to dismiss the suit for want of a written complaint on file. There is no bill of exceptions on this motion. The cause was heard in the Circuit Court on an appeal from a Justice of the Peace, and if the written complaint was found to be missing from the files and had been lost or destroyed, upon due proof having been made thereof a copy could have been substituted therefor. There being no bill of exceptions on this motion, it will be presumed that the court properly ruled thereon. Sheehan v. Richardson, 147 Ill. 366.

The judgment of the Circuit Court is affirmed.

1910

1910

Clerk

General Number 6410. April term, A D 1915. Agenda Number 58

ERWIN & RUSSELL,

Appellees,

vs

R. F. JOHNSON,

Appellant.

Appeal from Circuit Court,
Christian County.

200 I.A. 644

WILKEROSON, P. J.

Appellees are partners engaged in the abstract and real estate business in the City of Louisville, Clay County. They recovered a judgment in the sume of $575.00 against appellant for commissions for consummating thesale of a 240 acre tract of land. The question involved is principally one of fact as to what was the contract. Appellant claimed to own 502 acres of land in Clay County, which was divided into two tracts, one containing 240 and the other 262 acres. The negotiations between the parties began by appellant requesting appellees to sell the 502 acres for him at a net price of $32.50 per acre, appellees to receive as their commissions all they could procure above that figure. After some correspondence in regard to the matter appellees claim that in a conversation between appellant and appellee Erwin on February 20, 1913, the latter told appellant that they had a chance to sell the 240 acre tract but that appellant refused to sell this tract separately from the other; that subsequently appellees made the proposition to sell the 240 acre tract to the prospective purchaser thereof at $40.00 an acre, and that they (appellees) themselves would purchase the 262 acre tract

at $32.50 an acre, and would pay $1,000.00 cash down on the latter tract and give a mortgage back for the balance. ~~Since~~ To this appellant agreed, but when appellee approached the prospective purchaser the latter did not want to pay all cash for the 240 acre tract, but agreed to pay $5,000.00 cashand give his note for the balance. About a week thereafter, according to the testimony of Erwin, he told appellant what the prospective purchaser had agreed to do and claimed that in that conversation appellant stated, in substance, that it didn't make any difference to him whether appellees bought the 262 acre tract or not; in fact, he would rather they would not buy it. The reason given by the prospective purchaser of the 240 acre tract for not paying all cash was that inorder to raise the money he would have to sell some of the securities he owned at a discount. Erwin testified that appellant told him that he would pay half of the loss occasioned by the discount in order to get all cash for the farm; that subsequently the prospective purchaser tendered to appellees the full amount of the purchase price, $11,000.00 and appellant refused to convey. Appellant testified that he never at any time agreed to sell the 240 acre tract separately; that the final agreement with appellees was that they could sell the 240 acre tract to the prospective purchaser at $40.00 an acre thereby giving appellees $1,000.00 commissions, on condition that appellees purchased the 262 acre tract at $32.50 per acre, paying thereon the $1,300.00 commissions received by them, $1,000.00 cashin addition and the balance in three years without interest. Ap-

Appellees did not after the last conversation offer nor attempt to purchase the 262 acre tract. Appellant did not, in fact, own any of this land. He had a ~~title~~ deed to the land, which, on its face was absolute but which was, in fact, a mortgage, and consequently could not have sold the land in any event until he had procured title thereto. However, this can but partially affect the question at issue. If the contract was as claimed by theappellant, then appellees are not entitled to recover any commissions because they have never attempted nor offered to fulfill their part of the contract; while if the contract was as contended for by appellees, then their right of recovery is established The vital question is, what were the terms of the contract. On this question the evidence is close and conflicting. Upon the trial appellant offered in evidence the following telegram which he testified he received from the Western Union Telegraph Company in ~~the~~ due course of business;-" Louisville, Ill. March 8th 1913.

" W.F. Johnson,

" Assumption Ill.

" Wire us authority forthwith to make contract of sale for the two hundred forty acres. Very important.

" Irwin - Maxwell"

The Court sustained an objection to the introduction of this telegram on the ground that the original only would be competent. This telegram had a tendency to support appellant's theory that he had never authorized appellees to sell the 240 acre tract by itself. The

Court erred in refusing to admit it in evidence. The telegram purported to be sent by appellees at their own initiative, and they thereby made the telegraph company their agent. In the case of the Anheuser-Busch Brewing Association vs. Mattacher, 127 Ill.652 the rule as to the admission of telegrams in evidence is very clearly stated as follows:- " The application of the "rule of evidence here contended for must depend upon whether the messages delivered by the telegraph company to the plaintiff or those delivered by the defendant to the telegraph operator are, as between the parties to this suit, to be deemed the originals. In Durkee v.Vermont Central Railroad Co. 29 Vt. 127, the rule which we consider the most reasonable one is laid down viz., that the original, where the person to whom it is sent takes the risk of its transmission, or is the employer of the telegraph, is the message delivered to the operator, but where the person sending the message takes the initiative, so that the telegraph company is to be regarded as his agent, the original is the message actually delivered at the end of the line. See also Cleveland vs. Green 40 Mis. 431; Western Union Telegraph Co. v Shotter, 71 Ga. 769 Wilson V .R. and .. Railroad Co. 31 Minn. 481; Dunning v. Roberts, 35 Barb. 463; Gray on Communications by Telegraph secs. 104 129. The same rule was adopted by this court in Morgan v. The People, 59 Ill 58.

" The fact that the defendant took the initiative in sending the telegrams, thus employing the telegraph company as its agent,

"is clearly shown by its letters to the plaintiff read in evidence.
"
"Having thus employed such agent to convey communications to the plain-
"tiff it must be held to be bound by the acts of its agent to the ex-
"tent at least of making the messages delivered originals. thereby
"constituting them primary evidence of the contents of the messages
"sent."

In this case there was no suggestion on the trial that the message was inaccurate, or that appellees did not, in fact, send it.

Appellee Erwin, after testifying upon the trial on cross examination that the authority which appellees had for selling the land was a verbal one, was asked the following questions and gave the following answers: " Q By word of mouth only no writing of any kind or character? A I think we had letters to that effect too. Q- You say you had letters to that effect before that time? A-I think we had letters. Q-I would like to have you produce those letters please. Q- Where are those letters." To the last question an objection was made and sustained on the ground that it was immaterial. If appellees had any letters from appellant showing what the contract was they certainly would be very material in the tial of the issues in this case.

On the direct examination of the appellant after he had detailed the conversation he claims he had with appellee Erwin, in regard to the contract for the sale of the land, he was asked by his counsel this question: "Q Tell the jury whether or not you at any time modified, or if you did make any different agreement with Mr Erwin, other than that you testified to, made on the 20th?" Upon this question being objected to the Court stated in the presence of the jury:- "It assumes an agreement was made on that day, that isn't warranted by the evidence. You assume by your question, an agreement was made, the assumption isn't warranted by what this witness has testified to; he hasn't testified that any agreement was made, he has told a conversation

that took place, between he and Mr. Ervin You are calling that an " agreement".

The objection to the question might properly have been sustained on theground that it called for mere conclusions; but the positive statement of the Court that the previous testimony of appellant detailing the conversations he had had withervin in regard to the terms of the agreement, as he claimed that they were, did not constitute an agreement of any kind, could have no other effect than to destroy appellant's whole defense, and clearly invaded the province of the jury.

Three instructions were given for the plaintiffs. Each one instructs a verdict and is based solely upon a contract for the sale of the 240 acre tract of land alone, ignoring entirely the theory of the defense that the 240 acre tract was not to be sold unless appellees also purchased the 262 acre tract, as mentioned above. The giving of these instructions was also error.

For the errors indicated judgment must be reversed and the cause remanded.

1911

Rehearing denied Dec. 11-1915

GENERAL NUMBER 6413. APRIL TERM, A. D. 1915. Agenda Number 61.

MABEL FAPE ANDERSON, Appellee, - vs - THE DECATUR RAILWAY & LIGHT COMPANY, Appellant.	)	Appeal from Circuit Court Macon County.

ELDREDGE, P. J.

200 I.A. 646

Appellee recovered a verdict and judgment in the sum $2, 500.00 against appellant in an action on the case to recover damages for personal injuries claimed to have been received through the negligence of appellant's servants in the operation of a street car.

Appellant operates a street car system in the city of Decatur. Starting from the Union depot a line of double tracks run west of Eldorado street to Broadway, thence south on Broadway one block East North street, thence west on East North street. On the north side of East North street about half a block west of Broadway it maintains a car barn. Mill street, running north and south, enters and terminates in East North street on the south side thereof opposite said car barn. On the south side of East North street and on the east side of Mill street appellant maintains another car barn. Switch tracks run from the north main track into the car barn on the north side of East North street, and switch tracks run from the south main track into the car barn on the south side of said street,

[The accident happened about 9:30 o'clock on the evening of February 25. 1914. There had been a heavy snow storm and appellant in cleaning the snow

from the tracks running into the north car barn had piled it up in an embankment on the east side thereof, which extended out into the street to within about two feet of the north rail of the north main track.

The cause was submitted to the jury upon the first and second counts of the declaration. The first count charges, in substance, that while the plaintiff on the evening in question was riding in a sleigh drawn by a horse upon the street, which was covered with snow, and wherein the defendant had piled upon the north side thereof a bank of snow to a height of three feet so that it became necessary for vehicles going west in order to pass such point, to turn south upon the north set of tracks; that while plaintiff was riding in the sleigh going west upon the north side of the street she turned onto the tracks of defendant to avoid the snow bank, and that at the time was in the exercise of due care and caution for her safety; that it was the duty of the defendant to run its cars in a reasonable manner and to use reasonable care not to strike the vehicle in which plaintiff was riding; but that, not regarding its duty, it ran its car upon and against the vehicle in which plaintiff was riding with great force and violence and thereby she was thrown to the ground, and injured, etc.

The second count is based upon the failure of defendant to ring a bell or sound some other alarm to warn plaintiff that a street car was overtaking the sleigh.

Appellee is a married woman, about 23 years of age, and on the

evening of the accident was riding in a sleigh drawn by a single horse with two women companions. The evidence for appellee tends to show that she had driven south on Broadway to East North street where she turned west on to East North Street in which direction she drove on the north side of the latter street until she approached the snow bank in the street when she turned south on to the north main tracks and had proceeded west thereon a shorth distance when a street car operated by appellant struck her sleigh from behind overturning the same and throwing her and one of her companions onto the ground, that before she drove south on to the tracks to avoid the snow bank she turned and looked east but saw no car approaching. There was also evidence tending to show that when this car passed the car barns on its trip east ot the depot, the conductor dropped off the car to wait at the barn until it returned, and that as the car approached the car barn, the motorman, instead of looking ahead along the track, was watching the car barn for the conductor to get upon the car; and there was also evidence tending to show that as the car proceeded south and west around the corner of Broadway and East North street the trolley thereon slipped off the wire causing the car to become dark, and as there was no conductor on the car some little time elapsed before the motorman could proceed from his position in the car to the rear end thereof to replace the trolley, retake his position and start the car, and it is argued by counsel for appellee that it was on account of the car being in darkness that appellee failed to see it when she looked back before she turned on to the tracks. There is no evidence that any gong was sounded or warning given of the approach

of the car except immediately before it struck the sleigh, and there is no evidence that appellee or her companions saw the car before the collision.

The evidence for appellant tended to show that the trolley did not come off, and the car thereby become dark; that the head lights were burning; that the car was proceeding slowly in its usual way, and that the motorman did not see the sleigh until it abruptly turned in front of the car too late for him to stop the car before hitting it.

Under this state of the proff the questions of the negligence of appellant, and the contributory negligence of appellee were clearly questions of fact to be determined by the jury and the contention that the verdict is contrary to the evidence cannot be sustained.

In the cross examination of the witness, Ruby Delong, who was in the sleigh with appellee at the time of the accident, an objection was sustained to the following question;- " Q-Had you any other accidents or upsets that evening while you were out riding in the sleigh"? It is insisted this was error. Nothing is shown in the record that might make it have any materiality whatever to the issue. A question of the same import was asked of the witness, Eva Marie McDougal, to which an objection was also for the same reason properly sustained. On direct examination of the witness, Mabel Young, who was a passenger in the street car at the time of the accident, by counsel for appellee, she was asked if she heard the conductor say anything, and without stating what the conductor said, she answered:"There was something said." She was then asked the following question, to which an objection by appellant was over-

ruled; " State whether or not that fixed in your mind the fact that a sleigh in which some persons were traveling had been struck by the street car upon that occasion?" To which she answered: " I certainly think it did." It is urged that this testimony was incompetent because the witness did not see the accident and she was thus permitted to testify that an accident happened from hearsay. There is no controversy over the fact that the accident happened, and the error, if any, was harmless.

The third instruction given on behalf of appellee states an abstract proposition of law as to the respective rights of appellee and appellant to the use of the street, and one of the criticisms made thereto is that it does not refer to the evidence in the case. Abstract propositions of law never refer to the evidence. An instruction which is based upon the evidence is not an abstract proposition of law; nor can we sustain the further objection that it amounts to a peremptory instruction and substantially directs a verdict. The fourth instruction for appellee is as follows:-

" 4 The court instructs the jury that if you believe from a preponderance "of the evidence in this case that the servants of the defendant in the operation "of the street car in question, in the exercise of ordinary care for the safety "of others should have sounded a gong or an alarm of some kind upon the said car "to warn the plaintiff of the approach of such car, and that the said car, while the "plaintiff was driving upon the tracks upon which the said car was operated, came "into collision with the sleigh of the plaintiff by reason thereof she was injured, " and that she at the time was in the exercise of ordinary care, and that the "servants of the defendant failed to sound such gong or other alarm, and that by

reason of such failure, if the preponderance of the proof shows any such "failure to sound such a gong or other alarm, such collision occurred, then " in such state of the evidence you should find for the plaintiff, if you "further find from a preponderance of the evidence that the plaintiff, was "injured as a result of such collision." it is urged that this instruction is erroneous because it assumes a duty upon the part of the motorman to sound a gong at the time and place in question, even though the motorman did not know, and had no reason to expect or anticipate that the plaintiff was upon the street and in such close proximity to the car that she was likely to be struck thereby. We cannot see the force of this criticism in view of the evidence introduced on behalf of appellee. The car which caused the injury came around the curve on to East North street only about half a block behind the plaintiff. The motorman knew of the embankment of snow thrown across the street by appellant. He must have known that anybody driving west on the north side of the street would have to turn south on to the tracks of the company in order to pass this embankment. It was his duty to use reasonable care in approaching this narro part of the street to avoid injury to persons who might be traveling along the street at said place. It was a dark winter night, and there was some evidence that the motorman, instead of looking ahead of his car, was watching the car barns for the approach of the conductor. It has been repeatedly held that it is a question of fact for the jury to determine from all the evidence in the case whether it was negligence on the part of a motorman on a street car to fail to sound the gong or give a signal warning of his approach. Thus

we held in the case of C. & J. Electric Ry. Co. vs.Barrows, 128 Ill. App.11.

"At the same time the "street car company is charged with the knowledge that "the public may lawfully use the entire street and it must, in operating its cars "on the streets, use all reasonable means to avoid injuring those whom it knows "may rightfully use that part of the streets occupied by their tracks. North "Chicago Elec. Ry. Co. vs Pauser, 190 Ill. 67; North Chicago Street Railway Co. "vs. Swadraff, 189 Ill,155. It is the duty of the motorman to exercise ordinary "care to ascertain if the track ahead is clear, and he is bound to notice what "vehicles ahead of his car and near the truck are doing, and if he sees one going "upon the track or so near it as to be in danger of being struck by the car, to "warn the driver of such vehicle, and, so far as he is able for the purpose of pre-"venting a collision, to arrest the progress of the car. South Chicago City "Railway Co. v. Kinnare, Adm. 96 Ill. App. 215. It is a question of fact for "the jury whether or not the bell or gong should have been sounded and whether or "not ~~the call or~~ it was negligence for a traveler to attempt to cross the track at a regular place. "Chicago U. Tr. Co. v Jacobson, 217 Ill. 404; C. & P. St. Ry. Co. vs Meisner, "160 Ill. 320; Canfield v. North Chicago Street Ry. Co., 98 Ill. App. 5." Nor "do we think this instruction is in conflict with instruction number 6 given for appellant, which, in substance, told the jury that if appellee suddenly and un-expectedly and without the knowledge of the defendant, drove the sleigh upon the defendant's tracks and thereby placed herself in a position of danger; then in order to charge the defendant with a duty to avoid injuring her, the plaintiff must show by [illegible]nce in the case that the circumstances were of

such character that the defendant's servant or servants had an opportunity to become conscious of the facts giving rise to such duty, and a reasonable opportunity in the exercise of ordinary care and caution to perform such duty. This latter instruction simply explains the application of the rule announced in appellant's fourth instruction to an hypothesis of fact favorable to appellant, and there is no conflict between the two instructions.

The fifth instruction given for appellee is as follows:

"5. The court instructs the jury that if a person is in the exercise of reasonable care for his own safety and is suddenly placed in a position of peril by another, he is not required to exercise the highest degree of care to save himself from injury but is only required by the law to use the care that an ordinarily careful and prudent person would have exercised under similar circumstances to those in which he was then placed." This instruction should not have been given, as there was nothing in the evidence to warrant it. Appellee had no knowledge of the approach of the car until it struck the sleigh, and consequently there was no issue in the case as to the degree of care she should used upon being suddenly placed in a position of peril; but we do not think that that any harm to appellant resulted there from or that the giving of this instruction is such an error as should cause a reversal of the judgment. The issues in the case were thoroughly and definitely defined by the instructions as a whole, and those given for appellant protect every phase of its liability.

In support of the motion for a new trial an affidavit of H. C. White, claim agent for appellant, was filed stating that he had interviewed with the physician who attended appellee shortly after the accident, in which said physi

omitted to tell him the details of the results of said injuries received by appellee, and the claim is now made that on account of said omission, appellant was taken by surprise by the evidence of the physician as to the extent of appellee's injuries and for this reason a new trial should have been granted. There is nothing in the affidavit to show that the witness wilfully misrepresented anything as regards the appellee's injuries, and from aught that appears from the affidavit some of the results of the injury may have developed after the interviews of the affiant with him.

We are of the opinion there is no reversible error in the record, and the judgment is therefore affirmed.

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